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A CONCISE TREATISE
ON
THE LAW
OF
LANDLORD AND TENANT.

BY
WILLIAM MITCHELL FAWCETT
Of Lincoln's Inn, Esq., Barrister-at-Law.

Second Edition.

BY
JOHN MASON LIGHTWOOD, M.A.
Of Lincoln's Inn, Esq., Barrister-at-Law, Formerly Fellow of Trinity Hall, Cambridge,
AUTHOR OF "POSSESSION OF LAND."

With a Prefatory Note by the Author.

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1900.

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PREFATORY NOTE.

THE publishers have asked me to prefix to this new edition a few words of explanation. Although it has been matter of regret to myself that my engagements would not permit of my undertaking the heavy task, suggested to me by them, of incorporating in this book the mass of new law which has accumulated since its first publication, I should like to say that the work has lost nothing by this circumstance. Owing to the careful alterations and additions to which it has been subjected in Mr. Lightwood's hands, I believe that this edition will be found to contain the modifications necessary to bring the text into accordance with the present law, while the lines on which the book was framed are substantially retained.

The object (as explained in the original Preface) was to give, in as short a compass as possible, a practical view of the existing law of landlord and tenant, omitting matters of merely historical interest and topics collateral to the special subject, and, as far as practicable, stating principles laid down by judges in their own words. In attempting to carry out this design, brevity was perhaps rather pushed to

excess; and in this, as in other respects, I think, judging from the portions of the proofs which I have seen, that the present edition will be found to be an improvement on its predecessor.

W. M. FAWCETT.

LINCOLN'S INN,
NOVEMBER, 1899.

PREFACE TO SECOND EDITION.

IN preparing this edition I have had the advantage of using the materials which the Author had collected some years ago, and I am also indebted to him for numerous suggestions made during the progress of the work.

The arrangement of the book remains exactly as in the previous edition, save that "Assignments" have been made the subject of a separate chapter. But the changes in statute law, and the numerous recent decisions, have necessitated extensive alterations in the text, amounting to an entire recasting of portions. The references to the earlier authorities have also been largely augmented, the intention being to make the present edition a guide to all the relevant decisions. The increase in size which has thus resulted will not, I hope, detract from the qualities of conciseness and clearness which have hitherto characterised the work.

The Table of Contents and the Index have been enlarged, the latter being at the same time remade; and a new Table of Cases has been prepared with references to the various current series of reports. The date of each decision has been given in the footnotes. I have endeavoured to refer to all cases reported up to the end of October, 1899, and the more recent cases

include some of special interest, notably *Newby v. Eckersley* and *Re Pearson and P'Anson*, in which the Agricultural Holdings Act, 1883, has been held not to exclude agreements for compensation; and *Re Mackenzie*, which simplifies the sheriff's duty upon an execution when the landlord's claim to a year's rent is complicated by the bankruptcy of the tenant.

Attention may also be called here to the still later cases, not referred to in the text, of *Wride v. Dyer* (44 Sol. Journ. p. 27; 16 T. L. R. 23), in which a Divisional Court, approving *Doe v. Culliford* (*infra*, p. 441), have upheld a notice to quit, notwithstanding its technical invalidity; and *Ashby v. Wilson* (44 Sol. Journ. p. 43), in which Kekewich, J., has refused to allow a lessee to enforce a restrictive covenant entered into by an adjoining lessee holding under the same lessor, there being no question of a common building scheme.

JOHN M. LIGHTWOOD.

LINCOLN'S INN,

NOVEMBER, 1899.

CONTENTS.

	PAGE
TABLE OF CASES	xv
TABLE OF STATUTES	ci
TABLE OF FORMS	cxiii
EXPLANATION OF ABBREVIATIONS USED	cxv

CHAPTER I.

REQUISITES TO THE CREATION OF THE RELATION OF LANDLORD AND TENANT.

SECT. I.	PROPERTY CAPABLE OF BEING LET	2
SECT. II.	PERSONS CAPABLE OF MAKING AND TAKING LEASES	3
	(1) Restrictions arising from disability	3
	i. Infants	3
	(a) Leases by or on behalf of infants	3
	(b) Leases to infants	9
	ii. Lunatics	11
	iii. Married women	14
	iv. Aliens	22
	v. Convicts	22
	vi. Corporations	23
	(a) Ecclesiastical corporations	25
	(b) Universities and colleges	32
	(c) The Crown	33
	(d) Municipal corporations, &c.	34
	(e) Building societies, &c.	38
	(f) Companies	38
	vii. Trustees for charitable uses	39
	(a) Leases by trustees	39
	(b) Leases to trustees	41
	(2) Restrictions arising from limited interest	43
	i. Tenants in tail	43
	ii. Tenants for life	43
	iii. Leases by the Court	51
	iv. Leases under powers	52
	v. Trustees and personal representatives	58
	vi. Co-owners	63
	vii. Copyholders	64
	viii. Mortgagor and mortgagee	66
	ix. Judgment creditors	70
	x. Agents	70
	xi. Receivers, &c.	72
	(3) Restrictions arising from confidential relations	73
	(4) Leases by estoppel	74
SECT. III.	AN ACTUAL LETTING OR AN AGREEMENT CAPABLE OF SPECIFIC ENFORCEMENT	79
	Agreements distinguished from leases	79

	PAGE
SECT. III. AN ACTUAL LETTING OR AN AGREEMENT, &c.— <i>continued.</i>	
Present effect of agreement	81
Attornment	82
SECT. IV. EXCLUSIVE POSSESSION	84
Licences distinguished from leases	84
Occupation by a servant	87
Lodgers	88

CHAPTER II.

THE DIFFERENT KINDS OF TENANCY.

SECT. I. TENANCY BY SUFFERANCE	89
SECT. II. TENANCY AT WILL	90
Where implied	90
Effect of payment of rent	92
SECT. III. TENANCY FROM YEAR TO YEAR	93
Where implied	93
How implication may be rebutted	95
Terms consistent with	97
SECT. IV. TENANCY FOR A TERM OF YEARS	98
SECT. V. TENANCY FOR LIFE	100

CHAPTER III.

THE CONTRACT OF TENANCY.

SECT. I. AGREEMENTS FOR LEASES	102
(1) Conclusion of contract	102
(2) Requisites for validity of contract	103
i. Memorandum in writing	103
Essentials of memorandum	106
ii. Part performance	108
(3) Rights of intended lessee	111
(4) Remedies for breach of agreement	113
Action for damages	113
Specific performance	113
(5) Stamps	116
SECT. II. LEASES	118
(1) Statutory requisites	118
In what cases leases may be made by parol	118
(2) In what cases extrinsic evidence is admissible	121
(3) Form and construction of lease	124
Date	125
Recitals	126
Consideration	126
Operative words	126
Parcels	126
Rule of " <i>falsa demonstratio</i> "	127
Meaning of terms	129
Mines and minerals	131
Easements	132
Fixtures	136
Exceptions and reservations	136
Habendum	140
Commencement of term	141
Duration of lease	143
For years	143
From year to year	144
For life	144
Reddendum	146

	PAGE
SECT. I. RENT— <i>continued</i> .	
(e) Mode of making	254
Employment of bailiff	254
Bailiff's indemnity	256
Demand of rent	257
Entry	257
Seizure	259
Excessive distress	260
Impounding	263
Abandonment of distress	268
Pound breach	268
(f) Requisites to sale under distress	269
Inventory and notice	270
Effect of tender	272
Appraisement	274
When now necessary	274
(g) Sale	276
(h) Costs of distress	281
(i) Remedies for illegal distresses	282
Rescue	283
Replevin	283
Action	288
Summary statutory remedies	289
(j) Remedy for irregular distresses	290
ii. Remedy on execution against tenant	291
iii. Remedy on bankruptcy of tenant	298
iv. Remedy on winding-up	302
v. Remedy by action	305
Statute of Limitations	307
SECT. II. REPAIRS	308
(1) Where there is no express agreement	308
Obligations of tenant	308
" landlord	309
(2) Where there is an express agreement	311
Construction of general covenant to repair	311
Construction of covenant to put into repair... ..	313
" " keep in repair	314
" " yield up in repair	316
" conditional covenant to repair	318
" special agreements to repair	319
Repairs by lessor	321
Measure of damages for breach of covenant	322
SECT. III. WASTE	323
(1) Voluntary	323
Trees	324
Mines	325
Meliorating waste	326
(2) Permissive waste	328
(3) Remedy for waste	329
SECT. IV. MODE OF USING PREMISES	330
(1) Where there is no express agreement	330
Illegal purposes	330
Fitness of premises for use intended	331
(2) Where there is an express agreement	333
Construction of covenants	333
Relating to exercise of trade generally	333
" particular trades	334
" matters causing annoyance	336
" use as private residence	338
" forfeiture of licences	339
" trading with particular persons	339
" working of mines	341
Enforcing covenants	343

	PAGE
SECT. V. CULTIVATION OF LAND	344
(1) Where there is no express agreement	344
Obligation of tenant as to husbandlike cultivation...	344
" " expenditure of produce on	
premises	345
Custom	346
(2) Where there is an express agreement	347
Construction of covenants relating to course of hus-	
bandry	347
" " hay and straw	348
" " manure	350
Provisions in case of execution, &c.	350
SECT. VI. FENCES	352
(1) Liability to repair	352
Obligation of tenant for years...	352
" as between adjoining owners	352
(2) Liability to keep up boundaries	353
(3) Ownership of fences	354
SECT. VII. TREES	355
(1) Where there is no express agreement	355
Property in trees as between landlord and tenant ...	355
" as between landlord and third	
persons	355
Property in bushes, &c.	355
Estovers	355
Windfalls	356
(2) Where there is an express agreement	356
Construction of agreements relating to trees ...	356
SECT. VIII. INSURANCE	357
Construction of general covenant to insure	357
" covenant to insure in the names of	
specified persons	358
Failure to insure	359
Statutory provision in case of fire	360
SECT. IX. TAXES	360
(1) Where there is no express agreement	360
Taxes which fall on the landlord	360
Poor rate	361
General district rate	362
(2) Where there is an express agreement	362
Agreements relating to property tax and title	
rent-charge	362
Construction of agreements relating to payment of	
taxes	364
Construction of agreements relating to payment of	
rates and taxes	366
SECT. X. QUIET ENJOYMENT	369
(1) Where there is no express agreement	369
Implied contract for quiet enjoyment	369
" excluded by express covenant	371
Breach of implied contract	371
(2) Where there is an express agreement	371
Construction of general covenant for quiet enjoyment	371
" usual restricted covenant for quiet	
enjoyment	372
Breach of express covenant	373
Right to sue where entry cannot be made	375
Construction of special covenants for quiet enjoyment	376
Damages for breach of covenant for quiet enjoyment	377
SECT. XI. LIVE STOCK	377
SECT. XII. GAME	378
Reservation of game to landlord	378

	PAGE
SECT. XII. GAME— <i>continued</i> .	
Ground Game Act, 1880	381
Construction of agreements relating to game	383
SECT. XIII. UNDERLEASES	384
(1) Right to underlet... ..	384
Where there is no express agreement... ..	384
Where there is an express agreement	384
(2) What constitutes an underlease	386
Underleases distinguished from assignments... ..	386
(3) Rights and liabilities of underlessee	387
As against original lessor	387
„ underlessor	389
Liability of underlessees as between themselves	389

CHAPTER V.

ASSIGNMENTS.

SECT. I. VOLUNTARY	391
(1) Right to assign	391
Where there is no express agreement	391
Where there is an express agreement	392
Construction of covenant not to assign	392
Consent to assignment	394
Damages for breach	396
Effect of licence to assign	397
(2) Contract for assignment	397
(3) Mode of making assignment	399
Statutory requisites	399
(4) Rights and liabilities of assignee	401
As against lessor	401
Covenants running with land	404
Effect of re-assignment	409
Continued liability of lessee	410
As against lessee	410
Covenants to indemnify lessee	411
(5) Grant by landlord of his reversion	412
SECT. II. INVOLUNTARY	417
(1) On death	417
Of lessor	417
Of lessee	418
Executor's assent to bequest of leaseholds	418
„ liability under lease	420
(2) On bankruptcy of lessee	423
Vesting in trustee in bankruptcy	423
Disclaimer	424
(3) On conviction of lessee for felony	428

CHAPTER VI.

DETERMINATION OF THE TENANCY.

SECT. I. MODES APPLICABLE TO PARTICULAR KINDS OF TENANCY	430
(1) Determination of tenancy at sufferance	430
(2) Determination of tenancy at will	431
Express	431
Implied	432
(3) Determination of tenancy from year to year	433
i. When determinable	433

	PAGE
SECT. I. MODES APPLICABLE TO PARTICULAR KINDS OF TENANCY	
—continued.	
ii. Notice to quit	434
(a) Length of notice	434
(b) Reckoning of period... ..	437
(c) Form of notice	440
(d) By whom notice may be given	443
(e) To whom notice is to be given	445
(f) Mode of service	445
(g) Waiver of notice	447
iii. Verbal disclaimer	449
(4) Determination of tenancies for terms of years	450
Tenancies for optional terms	450
(5) Determination of tenancies for life	451
SECT. II. MODES GENERALLY APPLICABLE	452
(1) Merger	452
(2) Surrender	454
Express	454
Implied	455
Rent after surrender	460
Operation of surrender on rights of third persons	460
Surrender for purpose of renewal	461
(3) Forfeiture	462
i. Where there is no express proviso for re-entry	462
ii. Where there is an express proviso	464
Demand of rent	465
Re-entry	467
iii. Waiver of forfeiture	468
iv. Relief against forfeiture	472
(a) Under the Conveyancing Act, 1881	472
(b) In respect of non-payment of rent... ..	476
(c) In other cases	476
CHAPTER VII.	
TERMS OF QUITTING.	
SECT. I. FIXTURES	479
(1) What articles are fixtures	479
Mode of annexation	479
Object of annexation	481
Whether for temporary or permanent purpose	482
(2) Tenant's right to fixtures where there is no express agreement	484
i. Trade fixtures	484
ii. Agricultural fixtures	488
Agricultural Holdings Act, 1883	489
iii. Ornamental fixtures	490
iv. Time of removal	492
(3) Tenant's right under express agreement	494
SECT. II. EMBLEMENTS	497
(1) In what cases they may be claimed	497
(2) Provisions as to tenants of landlords entitled for uncertain interests	498
SECT. III. AWAY-GOING CROPS AND COMPENSATION FOR TILLAGES, &c.	498
SECT. IV. STATUTORY COMPENSATION FOR IMPROVEMENTS	502
(1) The Agricultural Holdings Act, 1883	502
(2) The Allotments, &c., Act, 1887	510
(3) The Tenants' Compensation Act, 1890	511
(4) The Market Gardeners' Compensation Act, 1895	511

	PAGE
SECT. V. DELIVERY OF POSSESSION	512
(1) Tenant's obligation to give possession	512
Encroachments	513
(2) Landlord's remedies for recovering possession	514
i. Indirect	514
Action for double value	514
Action or distress for double rent	517
ii. Direct	518
Entry	518
Forcible entry	518
Statute of Limitations	519
Action in the High Court	523
Action in the County Court	525
Action to recover possession	525
„ for the recovery of land	526
Proceedings before justices	527
Houses at rents not exceeding 20 <i>l.</i> a year	527
Deserted premises... ..	530

TABLE OF CASES.

	PAGE
Abbey v. Petch, 8 M. & W. 419	278
Abbot v. Blair, 8 W. R. 672	114
Abinger, Lord, v. Ashton, 17 Eq. 358 ; 22 W. R. 582	131, 342
Absolom v. Knight, Bull. N. P. 181 ; Barnes, 450	200
Accidental Death Insurance Co. v. Mackenzie, 5 L. T. 20 ; 9 W. R. 783	77
Ackland v. Lutley, 9 A. & E. 879	142, 450, 462
Ackland v. Pring, 2 M. & Gr. 937 ; 10 L. J. C. P. 231	418
Acocks v. Phillips, 5 H. & N. 183	466
Adams v. Clutterbuck, 10 Q. B. D. 403 ; 52 L. J. Q. B. 607 ; 48 L. T. 614 ; 31 W. R. 723	98, 121
Adams v. Gamble, 12 Ir. Ch. R. 102	16
Adams v. Gibney, 6 Bing. 656	370
Adams v. Grane, 1 Cr. & M. 380	231, 232
Adams v. Hagger, 4 Q. B. D. 480 ; 41 L. T. 224 ; 27 W. R. 402	81, 190
Adams and Kensington Vestry, <i>Re</i> , 27 C. D. 394 ; 54 L. J. Ch. 87 ; 51 L. T. 382 ; 32 W. R. 883	160
Agar v. Young, Car. & M. 78	75
Agnew v. Usher, 14 Q. B. D. 78 ; 54 L. J. Q. B. 371 ; 51 L. T. 752 ; 33 W. R. 126	524
Ahearn v. Bellman, 4 Ex. D. 201 ; 48 L. J. Ex. 681 ; 40 L. T. 771 ; 27 W. R. 928	443
Ailesbury's Settled Estate, Marquis of, <i>Re</i> , 1892, 1 Ch. 506 ; 61 L. J. Ch. 116 ; 65 L. T. 830 ; 40 W. R. 243 ; affirmed, 1892, A. C. 356 ; 67 L. T. 490	44
Alchorne v. Gomme, 2 Bing. 54	196, 225
Alcock v. Cooke, 5 Bing. 340	6
Aldenburgh v. Peaple, 6 C. & P. 212	251
Alderman v. Neate, 4 M. & W. 704 ; 3 Jur. 171	80
Alderson v. Maddison, 7 Q. B. D. 174 ; 50 L. J. Q. B. 466 ; 45 L. T. 334 ; 29 W. R. 556 ; in H. L., 8 App. Cas. 467 ; 52 L. J. Q. B. 737 ; 49 L. T. 303 ; 31 W. R. 820	109, 110
Alderson v. White, 2 De G. & J. 97	161
Aldin v. Latimer, Clark & Co., '94, 2 Ch. 437 ; 63 L. J. Ch. 601 ; 71 L. T. 119 ; 42 W. R. 553	87
Aldous v. Cornwell, L. R. 3 Q. B. 573	180
Aldridge v. Ferne, 17 Q. B. D. 212 ; 55 L. J. Q. B. 587 ; 34 W. R. 578	366, 368
Aldridge v. Howard, 4 M. & Gr. 921	199
Alford v. Vickery, Car. & M. 280	190, 220, 444, 446, 448
Allan v. Overseers of Liverpool, L. R. 9 Q. B. 180	362
Allchurch v. Hendon Union, '91, 2 Q. B. 430 ; 61 L. J. M. C. 27 ; 65 L. T. 450 ; 40 W. R. 86	362
Alcock v. Moorhouse, 9 Q. B. D. 366 ; 47 L. T. 404 ; 30 W. R. 871	413
Allen, <i>Ex parte</i> , 20 C. D. 341 ; 51 L. J. Ch. 724 ; 47 L. T. 65 ; 30 W. R. 601	425
Allen, <i>Re</i> , 34 C. D. 433 ; 56 L. J. Ch. 487 ; 56 L. T. 6 ; 35 W. R. 218	184
Allen v. Allen, Moseley, 112	490

	PAGE
Allen v. Anthony, 1 Mer. 282	415
Allen v. Bryan, 5 B. & C. 512	197
Allen v. England, 3 F. & F. 49, n.	520
Allen v. Flicker, 10 A. & E. 640; 3 Jur. 1029	275
Allen v. Hill, Cro. Eliz. 238... ..	89
Allen v. Walker, L. R. 5 Ex. 187	16
Allen v. Woods, 68 L. T. 143	524
Allhusen v. Brooking, 26 C. D. 559; 53 L. J. Ch. 520; 51 L. T. 57; 32 W. R. 657	82, 381
Alloway v. Steere, 10 Q. B. D. 22; 52 L. J. Q. B. 38; 47 L. T. 333; 31 W. R. 290	425
Allport v. Securities Co., Lim., 64 L. J. Ch. 491; 72 L. T. 533	373
Allum v. Dickinson, 9 Q. B. D. 632; 52 L. J. Q. B. 190; 47 L. T. 493; 30 W. R. 930	369
Altman v. Royal Aquarium Society, 3 C. D. 228	344
American Must Corp. v. Hendry, 62 L. J. Q. B. 388; 68 L. T. 742... ..	257, 258
Amfield v. White, Ry. & M. 246	364
Anderson v. Martindale, 1 East, 497	156
Anderson v. Midland Ry. Co., 3 E. & E. 614; 30 L. J. Q. B. 94; 7 Jur. N. S. 411; 3 L. T. 809	81, 91, 220, 245, 247
Anderson v. M. S. & L. Ry. Co., 46 W. R. 509; affirmed, '98, 2 Ch. 394	373, 415
Anderson v. Oppenheimer, 5 Q. B. D. 602; 49 L. J. Q. B. 708	310, 374
Anderson v. Vicary, '99, 2 Q. B. 436; 68 L. J. Q. B. 970	382
Anderton and Milner's Contract, <i>Re</i> , 45 C. D. 476; 59 L. J. Ch. 765; 63 L. T. 332; 39 W. R. 44	154, 164
Andrew v. Hancock, 1 Br. & B. 37	200, 202, 203
Andrew v. Pearce, 1 B. & P. N. R. 158	43
Andrews' Case, Cro. Eliz. 214	371
Andrews v. Dixon, 3 B. & A. 645	293
Andrews v. Hailes, 2 E. & B. 349; 22 L. J. Q. B. 409; 17 Jur. 761	513, 514
Andrews v. Paradise, 8 Mod. 318	372
Andrews v. Russell, Bull. N. P. 81 d	275
Angell v. Duke, L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; 32 L. T. 25; 23 W. R. 307	123, 124
Angell v. Duke, 32 L. T. 320; 23 W. R. 548	124
Angell v. Harrison, 17 L. J. Q. B. 25; 12 Jur. 114	245, 247
Angell v. Randall, 16 L. T. 498	305
Anglesey's, M. of, Estate, <i>Re</i> , 17 Eq. 283; 22 W. R. 507	213
Anon., 4 Leon. 4, c. 15	8
Anon., Amb. 209	344
Anon., Poph. 4	21
Anon., Loft, 275	517
Anon., 1 Mod. 180	141
Anon. v. Cooper, 2 Wils. 375	191, 387
Anstey v. Hobson, 1 Sm. & G. 505	6
Antil v. Godwin, 63 J. P. 441; 15 T. L. R. 462	367
Antrim, Marquis of, v. D. of Buckingham, 1 Ch. Cas. 17	15
Appleby, <i>Ex parte</i> , 20 W. R. 411	79
Appleton v. Campbell, 2 C. & P. 347	330
Appleton v. Doily, Velv. 135	226
Appleton v. Morray, 2 L. T. 516; 8 W. R. 653; 2 F. & F. 167	527
Archbold v. Scully, 9 H. L. C. 360... ..	253, 307, 521
Arden v. Boyce, '94, 1 Q. B. 796; 63 L. J. Q. B. 338; 70 L. T. 480; 42 W. R. 354	523
Arden v. Pullen, 10 M. & W. 321	310
Arden v. Sullivan, 14 Q. B. 832; 19 L. J. Q. B. 268; 14 Jur. 712	97
Arding v. Economic Printing Co., 79 L. T. 420; on app. 622	368

	PAGE
Arnal, <i>Ex parte</i> , 24 C. D. 26; 53 L. J. Ch. 134; 49 L. T. 221...	426
Arnison, <i>Ex parte</i> , L. R. 3 Ex. 56; 37 L. J. Ex. 57 ...	282
Arnitt v. Garnett, 3 B. & A. 440 ...	295
Arnott, <i>Re</i> , 35 Sol. Journ. 623 ...	12
Arnsby v. Woodward, 6 B. & C. 519 ...	464, 468
Arran v. Crisp, 12 Mod. 54 ...	364
Arundell v. Trevill, 1 Sid. 81 ...	284
Ashcombe v. Mitchell, 12 T. L. R. 17 ...	159
Ashcroft v. Bourne, 3 B. & Ad. 684 ...	531
Ashfield v. Ashfield, Sir W. Jones, 157; Noy, 92; Latch, 199...	8
Ashmore v. Hardy, 7 C. & P. 501 ...	247
Ashton v. Jones, 28 Beav. 460 ...	41
Astbury, <i>Ex parte</i> , 4 Ch. 630; 38 L. J. Bk. 9; 20 L. T. 997; 17 W. R. 997 ...	480, 481, 484
Aston v. Exeter, 6 Ves. 288 ...	354
Astry v. Ballard, 2 Mod. 193 ...	325
Atherstone v. Bostock, 2 M. & Gr. 511; 10 L. J. C. P. 113 ...	180
Atherton, <i>Re</i> , W. N. 1891, p. 85 ...	47, 48
Athy Guardians v. Murphy, 1896, 1 Ir. R. 65 ...	24
Atkinson, <i>Re</i> , 31 C. D. 577; 55 L. J. Ch. 49; 54 L. T. 503; 34 W. R. 445 ...	48, 49
Attack v. Bramwell, 3 B. & S. 520; 32 L. J. Q. B. 146; 9 Jur. N. S. 892 ...	257, 258, 282, 288
Attersoll v. Stevens, 1 Taunt. 183 ...	327
Attoe v. Hemmings, 2 Bulstr. 281 ...	417
Att.-Gen. v. Brown, 3 Ex. 662; 18 L. J. Ex. 336 ...	171
Att.-Gen. v. Brooke, 18 Ves. 326 ...	40
Att.-Gen. v. Cox, 3 H. L. C. 240 ...	460
Att.-Gen. v. Cross, 3 Mer. 524 ...	40
Att.-Gen. v. Dixie, 13 Ves. 519 ...	40
Att.-Gen. v. Foord, 6 Beav. 288 ...	40
Att.-Gen. v. Fullerton, 2 V. & B. 263 ...	354
Att.-Gen. v. Glyn, 12 Sim. 84 ...	41
Att.-Gen. v. Griffith, 13 Ves. 565 ...	40
Att.-Gen. v. Great Eastern Ry. Co., 11 C. D. 449; 48 L. J. Ch. 429; 40 L. T. 265; 27 W. R. 759 ...	3
Att.-Gen. v. Great Yarmouth, 21 Beav. 625 ...	35
Att.-Gen. v. Hammer, 27 L. J. Ch. 837 ...	127
Att.-Gen. v. Hotham, T. & R. 209 ...	75
Att.-Gen. v. Morgan, 2 Russ. 306 ...	40
Att.-Gen. v. Owen, 10 Ves. 555 ...	40, 59
Att.-Gen. v. Pargeter, 6 Beav. 150 ...	40
Att.-Gen. v. Stephens, 6 D. M. & G. 111; 25 L. J. Ch. 888; 2 Jur. N. S. 51 ...	354, 521
Att.-Gen. v. Tomline, 5 C. D. 750 ...	132
Att.-Gen. v. Tomline, 15 C. D. 150; 43 L. T. 486 ...	513
Aubrey v. Fisher, 10 East, 446 ...	324, 355
Augustien v. Challis, 1 Ex. 279; 17 L. J. Ex. 73 ...	293
Auriol v. Mills, 4 T. R. 94 ...	410
Austerberry v. Corp. of Oldham, 29 C. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807 ...	404
Austin v. Beddoe, 41 W. R. 619 ...	419
Auworth v. Johnson, 5 C. & P. 239 ...	308
Aveline v. Whisson, 4 M. & Gr. 801; 12 L. J. C. P. 58 ...	118, 178
Avenell v. Croker, Moo. & M. 172 ...	262
Avery v. Cheslyn, 3 A. & E. 75 ...	490, 491
Avery v. Wood, '91, 3 Ch. 115; 61 L. J. Ch. 75; 65 L. T. 122; 39 W. R. 577 ...	288
Axford v. Perrett, 4 Bing. 586 ...	286
Aylett v. Ashton, 1 My. & Cr. 105 ...	10
Aylet v. Dodd, 2 Atk. 238 ...	199
Aylward v. Kearney, 2 Ball & B. 463 ...	6, 74

	PAGE
Babbage <i>v.</i> Coulburn, 9 Q. B. D. 235; 52 L. J. Q. B. 50; 46 L. T. 794;	
30 W. R. 950	156
Bach <i>v.</i> Meats, 5 M. & S. 200	249
Bachelour <i>v.</i> Gage, Cro. Car. 188	410, 422
Badcock <i>v.</i> Hunt, 22 Q. B. D. 145; 58 L. J. Q. B. 134; 60 L. T. 314;	
37 W. R. 205	366
Badeley <i>v.</i> Vigurs, 4 E. & B. 71; 23 L. J. Q. B. 377; 1 Jur. N. S. 159	417
Badger <i>v.</i> Ford, 3 B. & A. 153	64
Badkin <i>v.</i> Powell, 2 Cowp. 476	264
Baggallay <i>v.</i> Pettit, 5 C. B. N. S. 637; 28 L. J. C. P. 169; 5 Jur. N. S.	
868	155, 156
Bagge <i>v.</i> Mawby, 8 Ex. 641; 22 L. J. Ex. 236	262, 263, 299
Baggs, <i>Re</i> , '94, 2 Ch. 416, <i>n.</i>	13
Bagot's Settlement, <i>Re</i> , 1894, 1 Ch. 177; 63 L. J. Ch. 515;	
70 L. T. 229; 42 W. R. 170	48, 49
Bagshawe <i>v.</i> Goward, Cro. Jac. 147	267
Bagshawes (Lim.) <i>v.</i> Deacon, 1898, 2 Q. B. 173; 67 L. J. Q. B. 658;	
78 L. T. 776; 46 W. R. 618	236, 268
Bail <i>v.</i> Mellor, 19 L. J. Ex. 279	262
Bailey <i>v.</i> Hobson, 39 L. J. Ch. 270	79
Baily <i>v.</i> De Crespigny, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; 19 L. T.	
681; 17 W. R. 494	158, 415
Bain <i>v.</i> Brand, L. R. 1 App. Cas. 762	479
Bain <i>v.</i> Fothergill, L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387;	
23 W. R. 261	113
Baines <i>v.</i> Lumley, 16 W. R. 674	521
Baird <i>v.</i> Fortune, 4 Macq. H. L. 127	121, 122
Baker, <i>Re</i> , 8 Morr. 116	425
Baker <i>v.</i> Davis, 3 Camp. 474	202
Baker <i>v.</i> Gostling, 1 Bing. N. C. 19	386, 387
Baker <i>v.</i> Greenhill, 3 Q. B. 148; 11 L. J. Q. B. 161; 6 Jur. 710	365
Baker <i>v.</i> Holtzapffel, 4 Taunt. 45	207
Baker <i>v.</i> Meryweather, 2 C. & K. 737	183
Baker <i>v.</i> Richardson, 6 W. R. 663	128
Ball <i>v.</i> Bridges, 22 W. R. 552	103
Ball <i>v.</i> Cullimore, 2 Cr. M. & R. 120	91, 432
Bally <i>v.</i> Wells, 3 Wils. 25	466
Bamford <i>v.</i> Creasy, 3 Giff. 675	477
Bandy <i>v.</i> Cartwright, 8 Ex. 913; 22 L. J. Ex. 285	369
Bangor, B. of, <i>v.</i> Parry, 1891, 2 Q. B. 277; 60 L. J. Q. B. 646;	
65 L. T. 379; 39 W. R. 541	39
Banks <i>v.</i> Rebbeck, 20 L. J. Q. B. 476	525
Bannister <i>v.</i> Hyde, 2 E. & E. 627; 29 L. J. Q. B. 141; 6 Jur. N. S. 171;	
1 L. T. 438	258, 268
Barber <i>v.</i> Brown, 1 C. B. N. S. 121; 26 L. J. C. P. 41; 3 Jur. N. S. 18	198
Barber <i>v.</i> Whiteley, 34 L. J. Q. B. 212	353
Barclay, <i>Ex parte</i> , 5 D. M. & G. 403; 25 L. J. Bk. 1; 1 Jur. N. S. 1145	491
Barcroft <i>v.</i> Welland, 12 L. R. Ir. 35	364
Barff <i>v.</i> Probyn, 64 L. J. Q. B. 557; 73 L. T. 118	493
Bargent <i>v.</i> Thompson, 4 Giff. 473; 9 Jur. N. S. 1192; 9 L. T. 365	477
Baring <i>v.</i> Abingdon, '92, 2 Ch. 374; 62 L. J. Ch. 105; 67 L. T. 6; 41	
W. R. 22	133
Barker <i>v.</i> Barker, 3 C. & P. 557	321
Barkshire <i>v.</i> Grubb, 18 C. D. 616; 50 L. J. Ch. 731; 45 L. T. 383;	
29 W. R. 929	134
Barlow <i>v.</i> Rhodes, 1 Cr. & M. 439	133, 134
Barlow <i>v.</i> Teal, 15 Q. B. D. 501; 54 L. J. Q. B. 564; 54 L. T. 63; 34	
W. R. 54	435
Barnard, <i>Ex parte</i> , 46 L. T. 824	423
Barnard <i>v.</i> Godscall, Cro. Jac. 309	410
Barnes <i>v.</i> Dowling, 44 L. T. 809	328
Barnett <i>v.</i> Earl of Guildford, 11 Ex. 19	61

	PAGE
Barnfather v. Jordan, 2 Dougl. 452...	409
Barrett v. Duke of Bedford, 8 T. R. 602 ...	360
Barret v. Barret, Hetley, 35 ...	326
Barret v. Blagrove, 5 Ves. 555 ...	200, 344
Barrett v. Rolph, 14 M. & W. 348; 14 L. J. Ex. 308 ...	387
Barrow v. Isaacs, '91, 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 39 W. R. 338 ...	395, 477
Barrs v. Lea, 33 L. J. Ch. 437; 12 W. R. 525 ...	173, 189, 191
Barry v. Goodman, 2 M. & W. 768 ...	82, 170
Barry v. Nugent, 3 Dong. 179 ...	80
Barry v. Stanton, Cro. Eliz. 330 ...	393
Barton v. Capewell Patents Co., 68 L. T. 857 ...	159
Barton v. Dawes, 10 C. B. 261; 19 L. J. C. P. 302 ...	121, 128
Barton v. Dickenson, 17 L. T. 264 ...	443
Barton v. Fitzgerald, 15 East, 530 ...	372
Bartram v. Aldous, 2 T. L. R. 237 ...	332
Barwick's Case, 5 Rep. 93 b....	144
Barwick v. Foster, Cro. Jac. 227; Yelv. 167 ...	193
Barwick v. Thompson, 7 T. R. 488...	76
Basten v. Carew, 3 B. & C. 649 ...	530
Bastin v. Bidwell, 18 C. D. 238; 44 L. T. 742 ...	156, 163
Batchelor v. Bigger, 60 L. T. 416 ...	368
Bateman v. Allen, Cro. Eliz. 437 ...	20
Bateman v. Farnsworth, 29 L. J. Ex. 365 ...	294
Bates v. Donaldson, 1896, 2 Q. B. 241; 65 L. J. Q. B. 578; 74 L. T. 751; 44 W. R. 659 ...	395
Bath's Case, Bishop of, 6 Co. 35a ...	141, 143, 144
Battison v. Hobson, 1896, 2 Ch. 403; 65 L. J. Ch. 695; 74 L. T. 689; 44 W. R. 615 ...	400, 401
Baumann v. James, 3 Ch. 508; 18 L. T. 424; 16 W. R. 877 ...	105, 106, 115
Baxter v. Browne, 2 W. Bl. 973 ...	80
Baxter v. Portsmouth, 5 B. & C. 170 ...	14
Bayley v. Bradley, 5 C. B. 396; 16 L. J. C. P. 206 ...	89
Bayley v. G. W. Ry. Co., 26 C. D. 434; 51 L. T. 337 ...	134
Baylis v. Dineley, 3 M. & S. 477 ...	7, 8
Baylis v. Jiggins, 1898, 2 Q. B. 315; 67 L. J. Q. B. 793; 79 L. T. 78 ...	366
Baylis v. Le Gros, 4 C. B. N. S. 537; 4 Jur. N. S. 513 ...	317, 467
Baylis v. Usher, 4 Moo. & P. 790 ...	261
Bayliss v. Fisher, 7 Bing. 153 ...	261
Bayly, <i>Ex parte</i> , 22 L. J. Bank. 26 ...	300
Bayly v. Corporation of Leominster, 1 Ves. 476 ...	163
Bayly v. Went, 51 L. T. 764...	225
Baylye v. Hughes, Cro. Car. 137 ...	405
Bayne v. Walker, 3 Dow, 233 ...	310
Baynes & Co. v. Lloyd, 1895, 1 Q. B. 820; 1895, 2 Q. B. 610; 64 L. J. Q. B. 787; 73 L. T. 250; 44 W. R. 328 ...	370
Baynes v. Smith, 1 Esp. 206 ...	234
Baynham v. Guy's Hospital, 3 Ves. 295 ...	162
Baynton v. Morgan, 22 Q. B. D. 74; 58 L. J. Q. B. 139; 37 W. R. 148 ...	209, 213
Beadel v. Pitt, 11 L. T. 592 ...	201
Beale v. Sanders, 3 Bing. N. C. 850; 1 Jur. 1083 ...	94, 97
Bealey v. Stuart, 7 H. & N. 753; 31 L. J. Ex. 281; 8 Jur. N. S. 389 ...	341
Beamish v. Cox, 16 L. R. Ir. 270 ...	436
Beard v. Knight, 8 E. & B. 865; 27 L. J. Q. B. 359; 4 Jur. N. S. 782 ...	296, 298
Beardmore v. Meakin, 1885, L. J. N.C. 8 ...	382
Beardman v. Wilson, L. R. 4 C. P. 57; 38 L. J. C. P. 91; 19 L. T. 282; 17 W. R. 54 ...	387
Beatson v. Nicholas, 6 Jur. 620 ...	161
Beattie v. Mair, 10 L. R. Ir. 208 ...	519
Beaty v. Gibbons, 16 East, 116 ...	501

	PAGE
Beauchamp (Earl) <i>v.</i> Winn, L. R. 6 H. L. 223; 22 W. R. 193...	129
Beaudeley <i>v.</i> Brook, Cro. Jac. 189 ...	120, 133
Beaufort (Duke of) <i>v.</i> Bates, 3 D. F. & J. 381; 31 L. J. Ch. 481; 6 L. T. 82; 10 W. R. 200 ...	320, 480, 494, 496
Beavan <i>v.</i> Delahay, 1 H. Bl. 5 ...	250, 500
Beavan <i>v.</i> M'Donnell, 9 Ex. 309; 10 Ex. 184 ...	14
Beck <i>v.</i> Denbigh, 29 L. J. C. P. 273; 6 Jur. N. S. 998; 2 L. T. 154; 8 W. R. 392 ...	261
Beck <i>v.</i> Rebow, 1 P. Wms. 94 ...	490
Beddall <i>v.</i> Maitland, 17 C. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484 ...	519
Beddington <i>v.</i> Atlee, 35 C. D. 317; 56 L. J. Ch. 655; 56 L. T. 514; 35 W. R. 799 ...	135
Bedell <i>v.</i> Constable, Vaughan, 179 ...	9
Bedford's Case, Earl of, 7 Rep. 8a ...	43
Bedford Union <i>v.</i> Bedford Impr. Comm. 7 Ex. 777; 21 L. J. M. C. 224 ...	365
Beer <i>v.</i> Beer, 12 C. B. 60; 21 L. J. C. P. 124; 16 Jur. 923 ...	148
Beer <i>v.</i> Saunter, 10 C. B. N. S. 435...	320
Bees <i>v.</i> Williams, 2 Cr. M. & R. 581 ...	459
Belaney <i>v.</i> Belaney, 2 Ch. 138; 36 L. J. Ch. 265; 16 L. T. 269; 15 W. R. 369 ...	453
Belasyse <i>v.</i> Burbridge, 1 Lutw. 213...	234
Belcher <i>v.</i> McIntosh, 8 C. & P. 720 ...	313
Belfour <i>v.</i> Weston, 1 T. R. 310 ...	207
Bell <i>v.</i> Wilson, 1 Ch. 303; 2 Dr. & Sm. 395 ...	131
Bellasis <i>v.</i> Burbrick, 1 Salk. 209 ...	305
Bellingham <i>v.</i> Alsop, Cro. Jac. 52 ...	63
Benn Davis, <i>Re</i> , 55 L. J. Q. B. 217; 54 L. T. 304; 34 W. R. 442 ...	235, 293
Bennett's Case, 2 Str. 787 ...	292
Bennett <i>v.</i> Bayes, 5 H. & N. 391; 29 L. J. Ex. 224; 2 L. T. 156; 8 W. R. 320 ...	257
Bennett <i>v.</i> Herring, 3 C. B. N. S. 370 ...	315, 417
Bennett <i>v.</i> Ireland, E. B. & E. 326; 38 L. J. Q. B. 48; 4 Jur. N. S. 1104 ...	94, 97, 207
Bennett <i>v.</i> Robins, 5 C. & P. 379 ...	226
Bennett <i>v.</i> Sadler, 14 Ves. 256 ...	333
Bennett <i>v.</i> Womack, 7 B. & C. 627; 1 M. & Ry. 644; 3 C. & P. 96; 6 L. J. (O. S.) K. B. 175 ...	148, 150, 151, 152, 153, 164
Bensing <i>v.</i> Ramsay, 14 T. L. R. 345; 62 J. P. 613 ...	242
Benson <i>v.</i> Gibson, 3 Atk. 395 ...	199
Bentley, <i>Re</i> , Wade <i>v.</i> Wilson, 54 L. J. Ch. 782; 33 W. R. 610 ...	45
Berkeley <i>v.</i> Hardy, 5 B. & C. 355 ...	70
Berney <i>v.</i> Moore, 2 Ridg. P. C. 310...	388
Berrey <i>v.</i> Lindley, 3 M. & Gr. 498; 11 L. J. C. P. 27; 5 Jur. 1061 ...	94, 98, 440
Berriman <i>v.</i> Peacock, 9 Bing. 384 ...	355
Berry <i>v.</i> Gibbons, 8 Ch. 747; 29 L. T. 88; 21 W. R. 754 ...	61
Bertie <i>v.</i> Beaumont, 16 East, 33 ...	87
Besley <i>v.</i> Besley, 9 C. D. 103; 38 L. T. 844; 27 W. R. 184 ...	112
Bessell <i>v.</i> Landsberg, 7 Q. B. 638; 14 L. J. Q. B. 355; 9 Jur. 576 ...	449
Bethell <i>v.</i> Abraham, 17 Eq. 24; 43 L. J. Ch. 180; 29 L. T. 715; 22 W. R. 179 ...	61
Bethell <i>v.</i> Blencowe, 3 M. & Gr. 119; 10 L. J. C. P. 243 ...	170, 443
Bettingham, <i>Re</i> , 9 T. L. R. 48 ...	368
Bettisworth's Case, 2 Rep. 31a ...	133
Betty, <i>Re</i> , 1899, 1 Ch. 821; 80 L. T. 675 ...	328
Betty <i>v.</i> Humphries, Ir. R. 9 Eq. 332 ...	9
Bevan <i>v.</i> Barnett, 13 T. L. R. 310 ...	469
Bevan <i>v.</i> Chambers, 12 T. L. R. 417 ...	498
Bevan <i>v.</i> Halgood, 1 J. & H. 222 ...	67
Bevil's Case, 4 Rep. 8a ...	233
Bickford <i>v.</i> Parson, 5 C. B. 920; 17 L. J. C. P. 192; 12 Jur. 277 ...	414

	PAGE
Bicknell v. Hood, 5 M. & W. 104; 3 Jur. 774 ...	79, 220
Bidder v. Trinidad Petroleum Co., 17 W. R. 153 ...	495
Biggin v. Bridge, 3 Keb. 534 ...	193
Biggins v. Goode, 2 Cr. & J. 364 ...	290, 291
Bignell v. Clarke, 5 H. & N. 487 ...	268
Billinghurst v. Speerman, 1 Salk. 297 ...	421
Birch v. Clifford, 8 T. L. R. 103 ...	323
Birch v. Stephenson, 3 Taunt. 469 ...	199
Birch v. Wright, 1 T. R. 378 ...	209, 384, 432, 435
Bird v. Baker, 1 E. & E. 12; 28 L. J. Q. B. 7; 4 Jur. N.S. 1148...	141, 451
Bird v. Defonvielle, 2 C. & K. 415 ...	210, 441
Bird v. Elwes, L. R. 3 Ex. 225; 37 L. J. Ex. 91; 18 L. T. 727;	312, 369
16 W. R. 1120 ...	2
Bird v. Great Eastern Ry. Co., 19 C. B. N. S. 263; 34 L. J. C. P. 366;	332
11 Jur. N.S. 782; 13 L. T. 365; 13 W. R. 989 ...	120, 121
Bird v. Greville, C. & E. 317 ...	382
Bird v. Higginson, 2 A. & E. 696; 6 <i>Ibid.</i> 824 ...	340
Birkbeck v. Paget, 31 Beav. 403 ...	135
Birmingham Breweries Lim. v. Jameson, 67 L. J. Ch. 403; 78 L. T. 512	160, 161
Birmingham, &c., Banking Co. v. Ross, 38 C. D. 295; 57 L. J. Ch. 601;	454
59 L. T. 609; 36 W. R. 914 ...	408
Birmingham Canal Co. v. Cartwright, 11 C. D. 421; 48 L. J. Ch. 552;	26
40 L. T. 784; 27 W. R. 597 ...	260
Birmingham Joint Stock Co. v. Lea, 36 L. T. 843 ...	490, 496
Birmingham, &c., Land Co. and Allday, <i>Re</i> , '93, 1 Ch. 342; 62 L. J. Ch.	191, 208
90; 67 L. T. 850; 41 W. R. 189 ...	90, 95
Bisco v. Holte, 1 Lev. 112 ...	153
Bishop v. Bryant, 6 C. & P. 484 ...	234
Bishop v. Elliott, 24 L. J. Ex. 229; 11 Ex. 113, 321 ...	526
Bishop v. Goodwin, 14 M. & W. 260 ...	507
Bishop v. Howard, 3 D. & R. 293; 2 B. & C. 100 ...	308
Bishop v. Taylor, 60 L. J. Q. B. 556; 64 L. T. 529; 39 W. R. 542 ...	236
Bisset v. Caldwell, 1 Esp. 206, note; Peake N. P. C. 36 ...	519
Bissill v. Williamson, 7 H. & N. 391 ...	428
Black v. Clay, 1894, A.C. 368; 71 L. T. 446 ...	10
Blackmore v. White, 1899, 1 Q. B. 293; 68 L. J. Q. B. 180; 80 L. T.	77, 228
79; 47 W. R. 448 ...	310
Blades v. Arundale, 1 M. & S. 711 ...	150, 151
Blades v. Higgs, 10 C. B. N. S. 713; 30 L. J. C. P. 347; ...	185, 516
Blake, <i>Ex parte</i> , 11 C. D. 572; 40 L. T. 859; 27 W. R. 901 ...	374
Blake v. Concannon, 4 Ir. R. C. L. 323 ...	21
Blake v. Foster, 8 T. R. 487 ...	107, 108
Blake & Co. v. Woolf, 1898, 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188;	175
47 W. R. 8 ...	211
Blakesley v. Whieldon, 1 Hare, 176... ..	106
Blatchford v. Cole, 5 C. B. N. S. 514; 28 L. J. C. P. 140; 5 Jur. N. S.	174
412	193
Blatchford v. Plymouth (Mayor of), 3 Bing. N. C. 691 ...	448
Blaxton v. Heath, Poph. 145... ..	110
Bleakley v. Smith, 11 Sim. 150	174
Blewitt v. Tritton, 1892, 2 Q. B. 327; 61 L. J. Q. B. 773; 67 L. T. 72;	339
41 W. R. 36	
Bliss v. Collins, 5 B. & A. 876	
Blore v. Sutton, 3 Mer. 237	
Blount v. Pearman, 1 Bing. N. C. 408	
Blunden's Case, Cro. Eliz. 565	
Blyth v. Dennett, 13 C. B. 178; 22 L. J. C. P. 79	
Boardman v. Mostyn, 6 Ves. 467	
Boase v. Jackson, 3 Br. & B. 185	
Bodkin v. Barker, Times, 14 Dec. 1897	
Boddington v. Robinson, L. R. 10 Ex. 270; 44 L. J. Ex. 223; 33 L. T.	
364; 23 W. R. 925	141

	PAGE
Bogg v. Midland Ry. Co., 4 Eq. 310; 36 L. J. Ch. 440; 16 L. T. 113...	162
Boileau v. Heath, 1898, 2 Ch. 301; 67 L. J. Ch. 529; 78 L. T. 622;	
46 W. R. 602	132
Bolton v. Bolton, 11 C. D. 968; 48 L. J. Ch. 467; 40 L. T. 582	136
Bolton v. Tomlin, 5 A. & E. 856	94
Bolton Partners v. Lambert, 41 C. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 37 W. R. 434	103, 106
Bond v. Freke, W. N. 1884, 47	475
Bond v. Rosling, 1 B. & S. 371; 30 L. J. Q. B. 227; 8 Jur. N. S. 78;	
4 L. T. 442; 9 W. R. 746	119
Bonner v. Tottenham Building Society, 1899, 1 Q. B. 161; 68 L. J. Q. B. 114; 79 L. T. 611; 47 W. R. 161	411
Boodle v. Cambell, 7 M. & Gr. 386; 13 L. J. C. P. 142; 8 Jur. 475	207, 209
Boone v. Eyre, 1 H. Bl. 273, note (a)	155
Boone v. Mitchell, 1 B. & C. 18	171
Booth v. Macfarlane, 1 B. & Ad. 904	518
Booth v. Pollard, 4 Y. & C. Ex. 61	344
Boraston v. Green, 16 East, 71	97, 250, 500
Bornis v. Edwards, 2 F. & F. 111	314
Boroughs' Case, 4 Rep. 72 b...	194
Borradaile v. Smart, 5 W. R. 270	178
Botting v. Martin, 1 Camp. 317	400
Boulton v. Reynolds, 2 E. & E. 369; 29 L. J. Q. B. 11; 6 Jur. N. S. 46	272
Bousher v. Morgan, 2 Anst. 404	2
Bowen v. Anderson, 1894, 1 Q. B. 164; 42 W. R. 236	93, 311, 435
Bowen v. Owen, 11 Q. B. 130; 17 L. J. Q. B. 5	274
Bowers v. Nixon, 12 Q. B. 558, n; 18 L. J. Q. B. 35; 13 Jur. 334	199
Bowes v. Croll, 6 E. & B. 255	97, 98
Bowes v. East London Waterworks Co., Jac. 324; 3 Mad. 375	52, 55, 56
Bowker v. Burdekin, 11 M. & W. 128	178
Bowker v. Williamson, 5 T. L. R. 382	175
Bowser v. Colby, 1 Hare, 109	463, 464, 476
Bowson v. Maclean, 2 D. F. & J. 415	140
Boyd v. Profaze, 16 L. T. 431	259
Boyd v. Shorrocks, 5 Eq. 72; 37 L. J. Ch. 144; 17 L. T. 197; 16 W. R. 102	481, 483, 487
Boyle v. Tamlyn, 6 B. & C. 329	353
Boys v. Ayherst, 6 Madd. 316	102
Bracebridge v. Buckley, 2 Price, 200	477
Brackenbury v. Pell, 12 East, 585	286
Bradburn v. Foley, 3 C. P. D. 129; 47 L. J. C. P. 331; 38 L. T. 421;	
26 W. R. 423	501
Bradburne v. Botfield, 14 M. & W. 559	156
Bradbury v. Wright, 2 Dougl. 624	148
Bradley v. Baylis, 8 Q. B. D. 195; 51 L. J. Q. B. 183; 46 L. T. 253;	
30 W. R. 823	242
Bradshaw v. Eyre, Cro. Eliz. 570	133
Brady v. Ball, 1 Bro. C. C. 427	287
Bragge v. Wiseman, 1 Brown. & G. 22	51
Braithwaite v. Cooksey, 1 H. Bl. 465	251
Bramley v. Chesterton, 2 C. B. N. S. 592; 27 L. J. C. P. 23; 3 Jur. N. S. 1104	513
Bramston v. Robins, 4 Bing. 11	203
Bramwell v. Lacy, 10 C. D. 691; 48 L. J. Ch. 339; 40 L. T. 361;	
27 W. R. 463	334, 337
Brandon v. Brandon, 5 Madd. 473	226
Branscombe v. Bridges, 3 Stark. 171; 1 B. & C. 145	257, 261
Branscombe v. Scarbrough, 6 Q. B. 13	285
Brashier v. Jackson, 6 M. & W. 549	79, 370
Brawley v. Wade, M'Clel. 664	223
Bray v. Fogarty, Ir. R. 4 Eq. 544	199, 338, 344

	PAGE
Braythwayte v. Hitchcock, 10 M. & W. 494; 6 Jur. 976 ...	91, 93, 94, 95
Brazier v. Hudson, 8 Sim. 67 ...	61
Brecknock Co. v. Pritchard, 6 T. R. 750 ...	313
Brennan v. Bolton, 2 Dr. & War. 349 ...	110
Brennan v. Flood, 4 Ir. C. L. R. 332 ...	229
Bretel v. Neveux, 39 L. T. 257 ...	109
Brett v. Clowser, 5 C. P. D. 376 ...	133
Brett v. Cumberland, Cro. Jac. 521; 1 Ro. Ab. 518 ...	420, 422
Brett v. Rogers, 1897, 1 Q. B. 525; 66 L. J. Q. B. 287; 76 L. T. 26; 45 W. R. 334 ...	367
Brewer v. Eaton, 3 Dougl. 230 ...	470
Brewer v. Hill, 2 Anst. 413 ...	2
Brewer v. Palmer, 3 Esp. 213 ...	117
Brewster v. Kidgell, Carth. 438; 1 Ld. Raym. 317; 2 Salk. 616 ...	365
Briant v. Pilcher, 16 C. B. 354 ...	156
Bridewell Hospital v. Fawkner, 8 T. L. R. 637 ...	395
Bridge v. Quick, 61 L. J. Q. B. 375; 67 L. T. 54 ...	475
Bridges v. Longman, 24 Beav. 27 ...	468
Bridges v. Potts, 17 C. B. N. S. 314; 33 L. J. C. P. 338; 10 Jur. N. S. 1049; 11 L. T. 373 ...	98, 435, 436
Bridges v. Smyth, 5 Bing. 410 ...	220
Bridgewater Engineering Co., <i>Re</i> , 12 C. D. 181; 48 L. J. Ch. 389 ...	302
Bridgland v. Shapter, 5 M. & W. 375 ...	2, 120
Briggs v. Sowry, 8 M. & W. 729; 11 L. J. Ex. 193 ...	298, 301
Brighton, Mayor of, v. Guardians of Brighton, 5 C. P. D. 368; 49 L. J. Q. B. 648 ...	520
Bright-Smith, <i>Re</i> , 31 C. D. 314; 55 L. J. Ch. 365; 54 L. T. 47; 34 W. R. 252 ...	128
Bristol, &c., Bread Co. v. Maggs, 44 C. D. 616; 59 L. J. Ch. 472; 62 L. T. 416; 38 W. R. 393 ...	106
Bristol (Corp. of) v. Westcott, 12 C. D. 461; 41 L. T. 117; 27 W. R. 841 ...	165, 393, 463
Bristol (Dean of) v. Jones, 1 E. & E. 484; 28 L. J. Q. B. 201; 5 Jur. N. S. 956; 7 W. R. 307 ...	318
Britain v. Rossiter, 11 Q. B. D. 123; 48 L. J. Q. B. 362; 40 L. T. 240; 27 W. R. 482 ...	109
Britton, <i>Re</i> , 61 L. T. 52; 37 W. R. 621 ...	427
Broadwood's S. E., <i>Re</i> , 7 Ch. 323; 41 L. J. Ch. 349; 26 L. T. 650; 20 W. R. 458 ...	19
Brocklehurst v. Lawe, 7 E. & B. 176; 26 L. J. Q. B. 107 ...	301
Brockington v. Saunders, 13 W. R. 46 ...	97, 499
Broggi v. Robins, 14 T. L. R. 429; 15 T. L. R. 224 ...	309, 311
Bromley v. Holden, Moo. & M. 175 ...	246
Brook, <i>Ex parte</i> , 10 C. D. 100; 48 L. J. Bk. 22; 39 L. T. 458; 27 W. R. 255 ...	492, 493
Brook v. Biggs, 2 Bing. N. C. 572 ...	78, 216
Brook v. Fletcher, 37 L. T. 100 ...	386
Brooke, <i>Re</i> , 1 Morr. 82 ...	426
Brooke v. Garrard, 3 K. & J. 608; 2 De G. & J. 62 ...	161
Brooke v. Noakes, 8 B. & C. 537 ...	246, 249
Brookes v. Humphreys, 5 Bing. N. C. 55; 2 Jur. 945 ...	373
Brooks v. Drysdale, 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331 ...	149, 150, 153, 465
Brooks v. Tolpitt, 1 T. L. R. 39 ...	389
Broom v. Phillips, 74 L. T. 459 ...	398
Broomfield v. Williams, 1897, 1 Ch. 602; 66 L. J. Ch. 305; 76 L. T. 243; 45 W. R. 469 ...	135
Broster, <i>Re</i> , Pruddah, <i>Ex parte</i> , 1897, 2 Q. B. 429; 66 L. J. Q. B. 766; 76 L. T. 692; 45 W. R. 576 ...	297
Brown v. Alabaster, 37 C. D. 490; 57 L. J. Ch. 255; 58 L. T. 266; 36 W. R. 155 ...	135
Brown v. Arundell, 10 C. B. 54; 20 L. J. C. P. 30 ...	232

	PAGE
Brown, Bayley & Dixon, <i>Re</i> , 18 C. D. 649; 50 L. J. Ch. 738; 45 L. T. 347; 30 W. R. 5...	304
Brown v. Blunden, Skin. 121	316
Brown v. Burtinshaw, 7 D. & Ry. 603	436, 449, 456
Brown v. Cocking, L. R. 3 Q. B. 672; 9 B. & S. 503; 37 L. J. Q. B. 250; 18 L. T. 560; 16 W. R. 933	526
Brown v. Crump, 1 Marsh. 567	345
Brown v. Glenn, 16 Q. B. 254; 20 L. J. Q. B. 205; 15 Jur. 189	258
Brown v. Metr. Counties, &c., Society, 1 E. & E. 832; 28 L. J. Q. B. 236; 5 Jur. N. S. 1028	83, 223
Brown v. Newmarch, 40 J. P. 212	529
Brown v. Quilter, 2 Ambl. 619	310
Brown v. Shevill, 2 A. & E. 138	231
Brown v. Storey, 1 M. & G. 117; 4 Jur. 319	68
Brown v. Tighe, 2 Cl. & F. 396	162
Brown v. Trumper, 26 Beav. 11	100, 144, 319
Browne v. Dummery, Hob. 208	252
Browne v. Joddrell, Moo. & M. 105	14
Browne v. Powell, 4 Bing. 230	195, 272
Browne v. Warner, 14 Ves. 156, 409	79, 100, 145
Browning v. Dann, Bull. N. P. 81	258
Brudnell's Case, 5 Rep. 9a	145
Brudnell v. Roberts, 2 Wils. 143	77
Brunskill v. Atkinson, 29 Sol. Journ. 29	503, 509
Bryan v. Weatherhead, Cro. Car. 17	132
Bryant v. Hancock & Co., 1898, 1 Q. B. 716; 67 L. J. Q. B. 507; 78 L. T. 397; 46 W. R. 387; in H. L. 68 L. J. Q. B. 889; 81 L. T. 96; 15 T. L. R. 490	339, 387
Brydges v. Lewis, 3 Q. B. 603; 11 L. J. Q. B. 268	413
Buccleugh (Duke of) v. Wakefield, L. R. 4 H. L. 377	140
Buck v. Nurton, 1 B. & P. 53	133
Buckinghamshire (Earl of) v. Drury, 2 Eden, 60	10
Buckland v. Papillon, 2 Ch. 67; 36 L. J. Ch. 81; 12 Jur. N. S. 992; 15 L. T. 378; 15 W. R. 92	100, 153, 423
Buckland v. Butterfield, 2 Br. & B. 54	324, 484, 486, 490, 491
Buckle v. Fredericks, 44 C. D. 244; 62 L. T. 884; 38 W. R. 742	336
Buckler's Case, 2 Rep. 55 b.	141, 144
Buckley, <i>Re</i> , 35 Beav. 449	38
Buckley v. Buckley, 1 T. R. 647	525
Buckley v. Pirk, 1 Salk. 316	420, 421
Buckley v. Taylor, 2 T. R. 600	192, 222, 299
Buckworth v. Simpson, 1 C. M. & R. 834	97, 404, 420
Budd v. Marshall, 5 C. P. D. 481; 56 L. J. Q. B. 24; 42 L. T. 793; 29 W. R. 148	367
Bull, <i>Ex parte</i> , 18 Q. B. D. 642; 56 L. J. Q. B. 270; 56 L. T. 571; 35 W. R. 455	254
Bullen v. Denning, 5 B. & C. 842	138
Bullock v. Dommitt, 6 T. R. 650	313
Bulwer v. Bulwer, 2 B. & A. 470	497
Bunch v. Kensington, 1 Q. B. 679; 10 L. J. Q. B. 203; 5 Jur. 461	235
Bunn v. Harrison, 3 T. L. R. 146	332
Bunting v. Sargent, 13 C. D. 330; 49 L. J. Ch. 109; 41 L. T. 643; 28 W. R. 123	41, 521
Burchell v. Clark, 2 C. P. D. 88; 46 L. J. C. P. 115; 35 L. T. 690; 25 W. R. 334	141, 177
Burchell v. Hornsby, 1 Camp. 360	329
Burdett v. Withers, 7 A. & E. 136; 1 Jur. 514	314
Burleigh v. Stubbs, 5 T. R. 465	176
Burling v. Read, 11 Q. B. 904	519
Burn v. Phelps, 1 Stark. 94	210
Burne v. Cambridge, 1 Moo. & R. 539	64
Burne v. Richardson, 4 Taunt. 720	220

	PAGE
Burnet v. Mann, 1 Ves. Sen. 156	15
Burnett v. Lynch, 5 B. & C. 589	370, 410, 411
Burns v. Bryan, 12 App. Cas. 184	157, 422
Burrell v. Jones, 3 B. & A. 47	272
Burrow v. Scammell, 19 C. D. 175; 51 L. J. Ch. 296; 45 L. T. 606; 30 W. R. 310	114
Burrows v. Gradin, 1 D. & L. 213; 12 L. J. Q. B. 333	196, 224
Burt v. Gray, 1891, 2 Q. B. 98; 60 L. J. Q. B. 664; 65 L. T. 229; 39 W. R. 429	472
Burt v. Haslett, 18 C. B. 162, 893; 25 L. J. C. P. 295; 2 Jur. N. S. 974; 4 W. R. 679	494
Burt v. Moore, 5 T. R. 329	378
Burton v. Barelay, 7 Bing. 745	140, 401, 452
Burtsall v. Bianchi, 65 L. T. 678	124
Bury v. Thompson, 1895, 1 Q. B. 231, 696; 64 L. J. Q. B. 500; 72 L. T. 187; 43 W. R. 338	443
Buszard v. Capel, 4 Bing. 137, 6 <i>Ib.</i> , 150; 8 B. & C. 141	189, 243, 244
Bute v. Grindall, 1 T. R. 338	364
Bute (Marquis of) v. Thompson, 13 M. & W. 487; 14 L. J. Ex. 95	208
Butler and Barker's Case, 3 Rep. 28	20
Butler v. Goundry, 4 T. L. R. 711	332
Butler v. Mulvihill, 1 Bligh. 137	74
Butler v. Swinnerton, Cro. Jac. 656	375
Buttermere v. Hayes, 5 M. & W. 456	397
Buxton, <i>Ex parte</i> , 15 C. D. 289; 43 L. T. 183; 29 W. R. 28	425
Buxton v. Lister, 3 Atk. 383	114
Byrue v. Acton, 1 Bro. P. C. 186	56
Byrne v. Brown, 22 Q. B. D. 657; 58 L. J. Q. B. 410; 60 L. T. 651	389
Caballero v. Henty, 9 Ch. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446	415
Cadby v. Martinez, 11 A. & E. 720	436, 451
Caddick, <i>Re</i> , 7 W. R. 334	5
Cadle v. Moody, 30 L. J. Ex. 385	454
Cadogan Estate Co., Lim., <i>Re</i> , 73 L. T. 387	149
Caldecott v. Smythies, 7 C. & P. 808	498, 499
Calvin's Case, 7 Rep. 1	22
Calvert v. Jolliffe, 2 B. & Ad. 418	294, 295
Calvert v. Sebright, 15 Beav. 156	375
Camden v. Batterbury, 5 C. B. N. S. 808; 7 C. B. N. S. 864; 28 L. J. C. P. 187, 335; 5 Jur. N. S. 627, 1405	81, 96
Campbell v. Hooper, 3 Sm. & G. 153	14
Campbell v. Leach, 2 Amb. 740	56, 57
Campbell v. Leach, L. R. 2 C. P. 422; L. R. 3 H. L. 285	54
Campbell v. Lewis, 3 B. & A. 392	405
Campbell v. Loader, 3 H. & C. 520; 34 L. J. Ex. 50	526
Campbell v. Wenlock, 4 F. & F. 716	332
Cannan v. Hartley, 9 C. B. 634; 19 L. J. C. P. 323; 14 Jur. 577	456
Cannock v. Jones, 3 H. L. C. 700; 3 Ex. 933; 5 <i>Ibid.</i> 713; 18 L. J. Ex. 204	149, 318, 319
Cannon Brewery Co., Lim., v. Nash, 77 L. T. 648; 14 T. L. R. 158	433
Cannon v. Villars, 8 C. D. 415; 47 L. J. Ch. 597; 38 L. T. 939; 26 W. R. 751	136
Canterbury v. Reg., 12 L. J. Ch. 281	309
Carden v. Tuck, Cro. Eliz. 89	130
Cardigan (Lord) v. Armitage, 2 B. & C. 197	138, 140
Cardwell v. Lucas, 2 M. & W. 111	179
Carlisle (Mayor of) v. Blamire, 8 East 487	402
Carlisle Café Co. v. Muse Bros. & Co., 67 L. J. Ch. 53; 77 L. T. 515; 46 W. R. 107	129
Carlton v. Bowcock, 59 L. T. 659	78
Carnarvon (Earl of) v. Villebois, 13 M. & W. 313	458

	PAGE
Carpenter v. Colins, Yelv. 73	392, 433
Carpenter v. Cresswell, 4 Bing. 409	155
Carpenter v. Parker, 3 C. B. N. S. 206; 27 L. J. C. P. 78	69, 211, 375
Carr v. Benson, 3 Ch. 524	85, 86
Carruthers, <i>Re</i> , 2 Man. 172	428
Carstairs v. Taylor, L. R. 6 Ex. 217; 40 L. J. Ex. 129; 19 W. R. 723	310
Carter, <i>Ex parte</i> , 8 C. D. 731; 39 L. T. 185; 27 W. R. 106	423
Carter and Claycole's Case, 1 Leon. 306	27
Carter v. Carter, 5 Bing. 406	205, 206
Carter v. Cummins, 1 Cas. in Ch. 84	207
Carter v. Madgwick, 3 Leon. 339	141
Carter v. Salmon, 43 L. T. 490	218
Carter v. Silber, 1892, 2 Ch. 278; 61 L. J. Ch. 401; 66 L. T. 473	7, 10
Carter v. Williams, 9 Eq. 678; 39 L. J. Ch. 560; 23 L. T. 183; 18 W. R. 593	409
Cartwright, <i>Re</i> , Avis v. Newman, 41 C. D. 532; 58 L. J. Ch. 590; 60 L. T. 891; 37 W. R. 612	328
Cartwright v. Forman, 7 B. & S. 243	341
Cartwright v. Miller, 36 L. T. 398	106
Cartwright v. Smith, 1 Moo. & R. 284	245
Cary v. Cary, 10 W. R. 669	501
Cary v. Matthews, 1 Salk. 191 (note)	255
Casey v. Hellyer, 17 Q. B. D. 97; 55 L. J. Q. B. 207; 54 L. T. 103; 34 W. R. 337	524
Castellain v. Preston, 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 557	359
Castleman v. Hicks, Car. & M. 266	266, 269
Catt v. Tourle, 4 Ch. 654	408
Cattle v. Gamble, 5 Bing. N. C. 46; 2 Jur. 922	2
Cattley v. Arnold, 1 J. & H. 651	93
Cavaleiro v. Puget, 4 F. & F. 537	102
Cave v. Hastings, 7 Q. B. D. 125; 50 L. J. Q. B. 575; 45 L. T. 348	106
Cayley v. Walpole, 39 L. J. Ch. 609; 22 L. T. 900; 18 W. R. 782	102
Cecil v. Langdon, 54 L. T. 418	48
Chadwick v. Broadwood, 3 Beav. 308	522
Chadwick v. Marsden, L. R. 2 Ex. 285; 36 L. J. Ex. 177; 16 L. T. 666; 15 W. R. 964	137
Chadwick v. Clarke, 1 C. B. 700; 14 L. J. C. P. 233; 9 Jur. 539	117
Chaloner v. Bolckow, 3 App. Cas. 933; 47 L. J. Q. B. 562; 39 L. T. 134; 26 W. R. 541	361
Chamberlayne v. Collins, 70 L. T. 217	483
Chambers v. Kingham, 10 C. D. 743; 48 L. J. Ch. 169; 39 L. T. 472; 27 W. R. 289	453
Chancellor v. Poole, 2 Dougl. 764	409
Chancellor v. Webster, 9 T. L. R. 568	217
Chandler v. Doulton, 3 H. & C. 553; 34 L. J. Ex. 89; 11 Jur. N. S. 286; 11 L. T. 639	261
Chandos v. Talbot, 2 P. Wms. 601	355
Channon v. Patch, 5 B. & C. 897	356
Chaplain v. Southgate, 10 Mod. 384	371
Chaplin v. Reid, 1 F. & F. 315	359
Chapman, <i>Re</i> , 10 T. L. R. 449	299
Chapman v. Beecham, 3 Q. B. 723; 12 L. J. Q. B. 42; 6 Jur. 968	221
Chapman v. Bluck, 4 Bing. N. C. 187; 2 Jur. 206	80, 125
Chapman v. Chapman, Cro. Car. 76	192
Chapman v. Towner, 6 M. & W. 100	79, 94
Chappell v. Gregory, 34 Beav. 250	309
Chappell v. Mason, 10 T. L. R. 404	133
Charlewood v. Bedford (Duke of), 1 Atk. 497	108
Charsley v. Jones, 53 J. P. 280; 5 T. L. R. 412	332
Chawner's Settled Estate, <i>Re</i> , 1892, 2 Ch. 192; 61 L. J. Ch. 331; 66 L. T. 745; 40 W. R. 538	45

	PAGE
Chedington's Case, Rector of, 1 Rep. 148b...	141
Cheetham v. Hampson, 4 T. R. 318	352
Cherry v. Heming, 4 Ex. 631	118, 124, 178
Cheshire Lines Committee v. Lewis, 50 L. J. Q. B. 121; 44 L. T. 293	100, 145
Chesterfield (Earl of) v. Duke of Bolton, Comyn, 627	313
Chesterham v. Williamson, 4 East, 469	85, 86
Chidley v. West Ham, 32 L. T. 486	480
Chilcote v. Youldon, 3 E. & E. 7; 29 L. J. M. C. 197	527
Child v. Chamberlain, 5 B. & Ad. 1049	282
Child v. Stenning, 11 C. D. 82; 48 L. J. Ch. 392; 40 L. T. 302;	
27 W. R. 462	377
Chipperfield v. Carter, 72 L. T. 487...	103
Chinnock v. Ely, 4 D. J. & S. 638; 11 Jur. N. S. 329; 12 L. T. 251;	
13 W. R. 597	103
Christ's Hospital v. Harrild, 2 M. & Gr. 707	365
Christy v. Tancred, 7 M. & W. 127; 9 M. & W. 438; 4 Jur. 1064	143, 513
Church v. Brown, 15 Ves. 258	150, 153, 164, 385, 391
Church v. Imperial Gas Light Co., 6 A. & E. 846...	23
Church v. Maxted, 67 L. J. Q. B. 823	205
Churcher v. Martin, 42 C. D. 312; 58 L. J. Ch. 586; 61 L. T. 113;	
37 W. R. 682	41
Churchill v. Evans, 1 Taunt. 529	353
Churchward v. Ford, 2 H. & N. 446; 26 L. J. Ex. 354	306
Churchward v. Johnson, 54 J. P. 326	239
Civil Service Musical Instrument Association v. Whiteman, 68 L. J. Ch.	
484; 80 L. T. 685	110
Clanricarde v. Ryder, 1898, 1 Ir. R. 98	523
Clapham v. Draper, C. & E. 484	214
Claridge v. Mackenzie, 4 M. & Gr. 143; 11 L. J. C. P. 72	78, 216
Clark, <i>Re</i> , 1 Ch. 292	6
Clark v. Adie, 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26	
W. R. 45	77
Clark v. Calvert, 3 Moo. 96	230, 234
Clark v. Crownshaw, 3 B. & Ad. 804	496
Clark v. Gaskarth, 8 Taunt. 431	230, 234
Clark v. Glasgow Ass. Co., 1 Macq. 668	313
Clark v. Smith, 9 C. & F. 123	56
Clarke v. Arden, 16 C. B. 227; 24 L. J. C. P. 162; 1 Jur. N. S. 710;	
3 W. R. 444	66
Clarke v. Fuller, 16 C. B. N. S. 24; 12 W. R. 671	102, 105, 106
Clarke v. Holford, 2 C. & K. 540	192, 222
Clarke v. Millwall Dock Co. 17 Q. B. D. 494; 55 L. J. Q. B. 378; 54	
L. T. 814; 34 W. R. 698	233
Clarke v. Moore, 1 Jo. & Lat. 723	198, 458
Clarke v. Roche, 3 Q. B. D. 170; 47 L. J. Q. B. 147; 37 L. T. 633;	
26 W. R. 112	175
Clarke v. Roystone, 13 M. & W. 752	346, 500
Clarke v. Thornton, 35 C. D. 307; 56 L. J. Ch. 302; 56 L. T. 294;	
35 W. R. 603	49
Clarke v. Westrope, 18 C. B. 765; 25 L. J. C. P. 287	349, 500, 502
Clarke v. Yorke, 52 L. J. Ch. 32; 47 L. T. 381; 31 W. R. 62...	124
Clarkington, In the goods of, 2 Sw. and Tr. 380	60
Clay v. Rufford, 5 De G. & Sm. 768...	59
Clayton's Case, 5 Rep. 1a	142, 437
Clayton and Barclay's Contract, <i>Re</i> , 1895, 2 Ch. 212; 64 L. J. Ch. 615;	
72 L. T. 764; 43 W. R. 549	424
Clayton v. Blakey, 8 T. R. 3	94, 119, 434
Clayton v. Burtenshaw, 5 B. & C. 41	79, 80, 174
Clayton v. Illingworth, 10 Hare, 451	114
Clayton v. Gregson, 6 N. & M. 694; 5 A. & E. 302	123
Clayton v. Leech, 41 C. D. 103; 61 L. T. 69; 37 W. R. 663	112

	PAGE
Clayton v. Penson, W. N. 1878, 158	147
Clayton v. Smith, 11 T. L. R. 374	367
Clegg v. Hands, 44 C. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 38 W. R. 433	340, 405, 407, 408
Clegg v. Rowland, 2 Eq. 160; 35 L. J. Ch. 396; 14 L. T. 217; 14 W. R. 530	53, 325, 326
Clemence, <i>Ex parte</i> , 23 C. D. 154; 52 L. J. Ch. 472; 48 L. T. 308; 31 W. R. 397	302
Clements v. Lambert, 1 Taunt. 205	133
Clements v. Matthews, 11 Q. B. D. 808; 52 L. J. Q. B. 772	461
Clements v. Welles, 1 Eq. 200; 35 L. J. Ch. 265; 13 L. T. 548	388
Clench v. D'Arenberg, C. & E. 42	88
Clemmel v. Read, 7 Taunt. 50	202
Clerk v. Wright, 1 Atk. 12	105
Clifford v. Watts, L. R. 5 C. P. 577; 40 L. J. C. P. 36; 22 L. T. 717; 18 W. R. 925	208, 342
Clifton v. Walmsley, 5 T. R. 564	208
Climie v. Wood, L. R. 3 Ex. 257; 4 <i>Ibid.</i> 328; 38 L. J. Ex. 223; 20 L. T. 1012	481, 482, 483, 484, 485, 487
Clinan v. Cooke, 1 Sch. & Lef. 22	71, 105, 106, 108
Cline's Estate, <i>Re</i> , 18 Eq. 213; 30 L. T. 249; 22 W. R. 512	214
Clitheroe Estate, <i>Re</i> , 31 C. D. 135; 55 L. J. Ch. 107; 53 L. T. 733; 34 W. R. 169	48, 49
Clithero v. Higgs, Sir W. Jones, 388	139
Clive v. Beaumont, 1 De G. & S. 397	102
Cloake v. Hooper, Freem. 122	375
Cloete, <i>Re</i> , 65 L. T. 102	239
Close v. Wilberforce, 1 Beav. 112	403
Clow v. Brogden, 2 M. & Gr. 39	389
Clowes v. Hughes, L. R. 5 Ex. 160; 39 L. J. Ex. 62; 22 L. T. 103; 18 W. R. 459	141, 222
Clun's Case, 10 Rep. 127a	193, 194, 213
Coal Consumers' Association, <i>Re</i> , 4 C. D. 625; 46 L. J. Ch. 501; 35 L. T. 729; 25 W. R. 300	302
Coates v. Collins, L. R. 7 Q. B. 144; 41 L. J. Q. B. 90; 26 L. T. 134; 20 W. R. 187	145
Coates v. Kenna, Ir. R. 6 Eq. 401	415
Coatsworth v. Johnson, 55 L. J. Q. B. 220; 54 L. T. 520	91, 475
Cobb v. Carpenter, 2 Camp. 13 n.	306
Cobb v. Stokes, 8 East, 358	144, 450, 515, 516, 517
Cockrane v. McCleary, Ir. R. 4 C. L. 165	137
Cocker v. Musgrove, 9 Q. B. 223; 15 L. J. Q. B. 365; 10 Jur. 922	294
Cocking v. Ward, 1 C. B. 858; 15 L. J. C. P. 245	398
Cockson v. Cock, Cro. Jac. 125	405
Codd v. Brown, 15 L. T. 536	501
Coe v. Clay, 5 Bing. 440	370, 376
Coggan v. Warwicker, 3 C. & K. 40	91
Coghil v. Freelove, 3 Mod. 325	422
Coker v. Guy, 2 B. & P. 565	122
Colbron v. Travers, 12 C. B. N. S. 181; 31 L. J. C. P. 257	201, 363
Colchester (Mayor of) v. Lowten, 1 V. & B. 226	23
Cole's Case, 1 Salk. 196	405
Cole v. Sury, Latch. 264	147, 148, 191
Cole v. Greene, 1 Lev. 309 (Cole v. Forth, 1 Mod. 94)	326
Cole v. West London, &c., Ry. Co., 27 Beav. 242	130
Cole v. White, cited 1 Br. C. C., p. 409	110
Colebeck v. Girdlers' Co., 1 Q. B. D. 234; 45 L. J. Q. B. 225; 34 L. T. 350; 24 W. R. 577	310
Colegrave v. Dias Santos, 2 B. & C. 76	136
Coleman v. Bathurst, L. R. 6 Q. B. 366; 40 L. J. M. C. 131; 24 L. T. 426; 19 W. R. 848	380

	PAGE
<i>Coleman v. Coleman</i> , 79 L. T. 66	175
<i>Coleman v. Foster</i> , 1 H. & N. 37	87
<i>Coles v. Trecothick</i> , 9 Ves. 248	71
<i>Collhoun v. Trustees of Foyle College</i> , 1898, 1 I. R. 233... ..	150, 152
<i>Collen v. Gardner</i> , 21 Beav. 540	71
<i>Collen v. Wright</i> , 8 E. & B. 647 ; 27 L. J. Q. B. 215 ; 4 Jur. N. S. 357 ; 6 W. R. 123	72
<i>Collett v. Curling</i> , 10 Q. B. 785 ; 16 L. J. Q. B. 390 ; 11 Jur. 890...147, 192, 436	
<i>Collett v. Young</i> , 33 W. R. 543	400
<i>Colley v. Streeton</i> , 2 B. & C. 273	322, 389
<i>Colling v. Treweek</i> , 6 B. & C. 398	177
<i>Collinge's Settled Estate</i> , <i>Re</i> , 30 C. D. 516 ; 57 L. J. Ch. 219 ; 57 L. T. 221 ; 36 W. R. 264	64
<i>Collingwood v. Row</i> , 26 L. J. Ch. 649	160
<i>Collins, Re</i> , 21 L. R. Ir. 508	298
<i>Collins v. Crouch</i> , 13 Q. B. 542 ; 18 L. J. Q. B. 209 ; 13 Jur. 361	422
<i>Collins and Harding's Case</i> , 13 Rep. 57 ; Cro. Eliz. 606	189, 211, 212
<i>Collins v. Sillye</i> , Sty. 265	392
<i>Collins v. Willmott</i> , 11 L. T. 340 ; 13 W. R. 204	113
<i>Collison v. Lettson</i> , 6 Taunt. 224	407
<i>Colton v. Lingham</i> , 1 Stark. 39	99
<i>Colyer v. Speer</i> , 2 Ball & B. 67	294
<i>Combe's Case</i> , 9 Rep. 75a	72
<i>Congham v. King</i> , Cro. Car. 221	402
<i>Congleton (Mayor of) v. Pattison</i> , 10 East, 130	406, 407
<i>Connor v. Fitzgerald</i> , 11 L. R. Ir. 106	110
<i>Conny's Case</i> , 9 Rep. 85a	10
<i>Constable and Cranswick's Arbitration, Re</i> , 80 L. T. 164 ; 43 Sol. Journ. 208	500
<i>Conquest v. Ebbetts</i> , 1896, A. C. 490 ; 65 L. J. Ch. 808 ; 75 L. T. 36 ; 45 W. R. 50	322, 389
<i>Conservators of River Thames v. Commissioners of Inland Revenue</i> , 18 Q. B. D. 279 ; 56 L. J. Q. B. 181 ; 56 L. T. 198 ; 35 W. R. 274	170, 841
<i>Cooch v. Goodman</i> , 2 Q. B. 580 ; 11 L. J. Q. B. 225 ; 6 Jur. 779	23, 178
<i>Cook v. Corbett</i> , 24 W. R. 181	262
<i>Cook v. Guerra</i> , L. R. 7 C. P. 132 ; 41 L. J. C. P. 89 ; 26 L. T. 97 ; 20 W. R. 367	194, 198
<i>Cook v. Moylan</i> , 1 Ex. 67 ; 16 L. J. Ex. 253	413
<i>Cook v. Waugh</i> , 2 Giff. 201	115
<i>Cook v. Whellock</i> , 24 Q. B. D. 658 ; 59 L. J. Q. B. 329 ; 62 L. T. 675 ; 38 W. R. 534	75
<i>Cook v. Williams</i> , 13 T. L. R. 481	103
<i>Cooke v. Cholmondeley</i> , 4 Drew. 326	130
<i>Cooke v. Clayworth</i> , 18 Ves. 12	74
<i>Cooke v. Ingram</i> , 68 L. T. 671	136
<i>Cooke v. Loxley</i> , 5 T. R. 4	78
<i>Cooke v. Yates</i> , 4 Bing. 90	129
<i>Coombe v. Green</i> , 11 M. & W. 480 ; 12 L. J. Ex. 291	319
<i>Coomber v. Howard</i> , 1 C. B. 440	147, 191
<i>Coombes v. Dutton</i> , 5 M. & W. 469	451
<i>Coombes v. Wilks</i> , 1893, 3 Ch. 77 ; 61 L. J. Ch. 42 ; 65 L. T. 56 ; 40 W. R. 77	107
<i>Cooper, Ex parte</i> , 34 L. J. Ch. 373 ; 2 Dr. & Sm. 312	58
<i>Cooper v. Belsey</i> , 1899, 1 Ch. 639 ; 68 L. J. Ch. 258 ; 80 L. T. 69 ; 47 W. R. 443	64
<i>Cooper v. Blandy</i> , 1 Bing. N. C. 45	78
<i>Cooper v. Flynn</i> , 3 Ir. L. R. 473	174
<i>Cooper v. Lands</i> , 14 L. T. 287 ; 14 W. R. 610	82
<i>Cooper v. Pearse</i> , 1896, 1 Q. B. 562 ; 65 L. J. M. C. 95 ; 74 L. T. 495 ; 44 W. R. 494	511
<i>Cooper v. Robinson</i> , 10 M. & W. 694 ; 12 L. J. Ex. 48	143, 305
<i>Cooper v. Stuart</i> , 14 A. C. 286 ; 58 L. J. P. C. 93 ; 60 L. T. 875	137
<i>Cooper v. Twibill</i> , 3 Camp. 286, note (a)	339

	PAGE
Cooth v. Jackson, 6 Ves. 12	109
Cope, <i>Re</i> , 16 C. D. 49	60
Copeland v. Stephens, 1 B. & A. 593	185, 186
Copeland v. Watts, 1 Stark. 96	459
Copland v. Laporte, 3 A. & E. 517	156
Copp v. Aldridge & Co., 11 T. L. R. 411	311
Copper Mining Co. v. Beach, 13 Beav. 478... ..	162
Corbett, <i>Ex parte</i> , 14 C. D. 122; 49 L. J. Bk. 74; 28 W. R. 569	428
Corbett v. Jonas, 1892, 3 Ch. 137; 62 L. J. Ch. 43; 67 L. T. 191	136
Corbett v. Plowden, 25 C. D. 678; 54 L. J. Ch. 109; 50 L. T. 740; 32 W. R. 667	69
Corder v. Drakeford, 3 Taunt. 382	174
Cornwall v. Dawson, 24 L. T. 664... ..	158, 383
Cornish v. Cleife, 3 H. & C. 446; 34 L. J. Ex. 19; 11 Jur. N. S. 181; 11 L. T. 606; 13 W. R. 389	316
Cornish v. Searell, 8 B. & C. 471	78, 82, 216, 458
Cornish v. Stubbs, L. R. 5 C. P. 334; 39 L. J. C. P. 202; 22 L. T. 21; 18 W. R. 547	87, 95, 414, 436
Corpe v. Overton, 10 Bing. 252	11
Corpus Christi Coll. v. Rogers, 49 L. J. Q. B. 4	522
Corus v. Anon., Cro. Eliz. 544	372
Cory v. Bristow, 2 App. Cas. 262; 46 L. J. M. C. 273; 36 L. T. 595; 25 W. R. 383	84, 86
Cosby v. Shaw, 19 L. R. Ir. 307; 23 L. R. Ir. 181	496
Cosh's Contract, <i>Re</i> , 1897, 1 Ch. 9; 66 L. J. Ch. 28; 75 L. T. 365; 45 W. R. 117... ..	396
Cosser v. Collinge, 3 My. & K. 283	153, 388
Coster v. Cowling, 7 Bing. 456	174
Coster v. Wilson, 3 M. & W. 411	247
Cotesworth v. Spokes, 10 C. B. N. S. 103; 30 L. J. C. P. 220; 7 Jur. N. S. 803	466
Cotsworth v. Bettison, 1 Ld. Raym. 104	269, 283
Cottee v. Richardson, 7 Ex. 143; 21 L. J. Ex. 52	144
Cotton's Case, Godb. 191	24
Counter v. Macpherson, 5 Moo. P. C. 83	318
Coupland v. Maynard, 12 East, 134	250, 455
Courtown v. Ward, 1 Sch. & Lef. 8... ..	356
Cousens v. Rose, 12 Eq. 366; 24 L. T. 820; 19 W. R. 792	136
Cousins v. Phillips, 3 H. & C. 892; 35 L. J. Ex. 84	412, 462
Cove v. Smith, 2 T. L. R. 778	471
Cowan v. Milbourn, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 16 L. T. 290; 15 W. R. 750	331
Coward v. Gregory, L. R. 2 C. P. 153; 36 L. J. C. P. 1; 12 Jur. N. S. 1000; 15 L. T. 279; 15 W. R. 170	314, 318, 471
Cowen v. Phillips, 33 Beav. 18	119
Cowen v. Truefitt, 1898, 2 Ch. 551; 67 L. J. Ch. 695; 79 L. T. 348; 47 W. R. 29; App. '99, 2 Ch. 309; 68 L. J. Ch. 563; 81 L. T. 104; 47 W. R. 661	127
Cowley (Earl) v. Wellesley, 1 Eq. 659	132
Cowper v. Fletcher, 6 B. & S. 464; 34 L. J. Q. B. 187; 12 L. T. 420; 13 W. R. 739	63
Cox v. Bailey, 6 M. & Gr. 193	255
Cox v. Bent, 5 Bing. 185	92, 94
Cox v. Bishop, 8 D. M. & G. 815; 26 L. J. Ch. 389; 3 Jur. N. S. 499... ..	38, 403
Cox v. Brain, 3 Taunt. 95	2
Cox v. Glue, 5 C. B. 533; 17 L. J. C. P. 162; 12 Jur. 185	129
Cox v. Knight, 18 C. B. 645; 25 L. J. C. P. 314	216
Cox v. Leigh, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123; 30 L. T. 494; 22 W. R. 730	293
Cox v. Middleton, 2 Drew. 209; 23 L. J. Ch. 618; 2 W. R. 284	106
Cox v. Painter, 7 C. & P. 767	265

	PAGE
Coxhead <i>v.</i> Mullis, 3 C. P. D. 439; 47 L. J. C. P. 761; 39 L. T. 349; 27 W. R. 136	8
Crabtree <i>v.</i> Robinson, 15 Q. B. D. 312; 54 L. J. Q. B. 544; 33 W. R. 936... ..	258
Craig, <i>Re</i> , Ir. R. 4 Eq. 158	128
Craig's Claim, <i>Re</i> , 1895, 1 Ch. 267	412
Craig <i>v.</i> Greer, 1899, 1 Ir. R. 258	344
Cramer <i>v.</i> Mott, L. R. 5 Q. B. 357; 39 L. J. Q. B. 172; 22 L. T. 857; 18 W. R. 947	230, 259
Crane <i>v.</i> Batten, 23 L. T. O. S. 220	359, 417
Crawford <i>v.</i> Newton, 36 W. R. 54	316
Crawley <i>v.</i> Price, L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874... ..	98, 164
Creagh <i>v.</i> Blood, 2 Jo. & Lat. 509; 3 <i>Ibid.</i> 133	14, 458
Creak <i>v.</i> Justices of Brighton, 1 F. & F. 110	530
Credland <i>v.</i> Potter, 10 Ch. 8; 44 L. J. Ch. 169; 31 L. T. 522; 23 W. R. 36	400
Creswell <i>v.</i> Davidson, 56 L. T. 811	464
Crisp's Case, Cro. Eliz. 164	120
Crisp <i>v.</i> Churchill, cited 1 B. & P. 340	10, 330
Crisp <i>v.</i> Price, 5 Taunt. 548	129
Crocker <i>v.</i> Fothergill, 2 B. & A. 652	525
Croft <i>v.</i> London & County Banking Co., 14 Q. B. D. 347; 54 L. J. Q. B. 277; 52 L. T. 374	476
Croft <i>v.</i> Lumley, 5 E. & B. 648; 6 H. L. C. 672; 27 L. J. Q. B. 321; 4 Jur. N. S. 903	165, 167, 334, 385, 394, 469
Cromwell <i>v.</i> Andrews, Cro. Eliz. 15... ..	194
Cronin <i>v.</i> Rogers, C. & E. 348	471, 474
Crook, <i>Re</i> , 66 L. T. 29	300
Crook <i>v.</i> Corp. of Seaford, 6 Ch. 551; 25 L. T. 1; 19 W. R. 938	24
Cropper <i>v.</i> Warner, C. & E. 152	236
Crosby <i>v.</i> Wadsworth, 6 East, 602	84
Crosier <i>v.</i> Tomkinson, 2 Ld. Ken. 439	231
Cross <i>v.</i> Barnes, 46 L. J. Q. B. 479; 36 L. T. 693	481, 483
Cross <i>v.</i> Eglin, 2 B. & Ad. 106	131
Cross <i>v.</i> Jordan, 8 Ex. 149; 22 L. J. Ex. 70	466
Crosse <i>v.</i> Duckers, 27 L. T. 816; 21 W. R. 287	350
Crosse <i>v.</i> Morgan, 60 L. T. 703; 37 W. R. 543	152
Crosse <i>v.</i> Raw, L. R. 9 Ex. 209; 43 L. J. Ex. 144; 23 W. R. 6	368
Crosse <i>v.</i> Welch, 8 T. L. R. 401, 709	262, 298
Crosse <i>v.</i> Young, 2 Show. 425	372
Crossfield <i>v.</i> Morrison, 7 C. B. 286; 18 L. J. C. P. 135; 13 Jur. 565	411
Crossley <i>v.</i> Maycock, 18 Eq. 180; 43 L. J. Ch. 379; 22 W. R. 387	102, 103
Crouch <i>v.</i> Fastolfe, Sir T. Raym. 418	194
Crouch <i>v.</i> Tregonning, L. R. 7 Ex. 88; 41 L. J. Ex. 97; 26 L. T. 286; 20 W. R. 536	411
Crowder <i>v.</i> Self, 2 Moo. & R. 190	261
Crowley <i>v.</i> Vittey, 7 Ex. 319; 21 L. J. Ex. 135	198, 458, 525
Crowther, <i>Re</i> , 4 Morr. 100	426
Crowther <i>v.</i> Ramsbottom, 7 T. R. 654	271
Croydon Hospital <i>v.</i> Farley, 6 Taunt. 467	24
Crumph <i>v.</i> Temple, 7 T. L. R. 120	82
Crusoe <i>v.</i> Bugby, 2 W. Bl. 766; 3 Wils. 234	385, 393
Cubitt <i>v.</i> Porter, 8 B. & C. 257	354
Cuckson <i>v.</i> Winter, 2 M. & Ry. 313	284
Culling <i>v.</i> Tuffnall, Bull. N. P. 34	480, 486
Culverhouse, <i>Re</i> , 1896, 2 Ch. 251; 65 L. J. Ch. 484; 74 L. T. 347; 45 W. R. 10	418
Cumberland <i>v.</i> Bowes (or Lady Glamis), 15 C. B. 348; 24 L. J. C. P. 46; 1 Jur. N. S. 236	94, 349
Cumberland Banking Co. <i>v.</i> Maryport Hematite, &c., Co., 1892, 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280	488, 492

	PAGE
Cunning v. Bedborough, 15 M. & W. 438...	202
Cunningham v. Butler, 3 Giff. 37 ...	128
Cuno, <i>Re</i> , 43 C. D. 12; 62 L. T. 15 ...	16
Curling v. Mills, 6 M. & Gr. 173; 7 Scott, N. R. 709; 12 L. J. C. P. 316	81
Curtis v. Hubbard, 1 Hill's Rep. (New York) 336 ...	257
Curtis v. Nixon, 24 L. T. 706 ...	72
Curtis v. Spitty, 1 Bing. N. C. 756; 4 L. J. C. P. 236 ...	146, 402
Curtis v. Wheeler, Moo. & M. 493 ...	228, 386
Cuthbertson v. Irving, 6 H. & N. 135; 29 L. J. Ex. 485; 6 Jur. N. S. 1211; 3 L. T. 335; 8 W. R. 704 ...	68, 75, 76
Cutting v. Derby, 2 W. Bl. 1075 ...	194, 450, 515
Cutting v. Derby, 2 W. Bl. 1077 ...	64, 524
Dakin v. Cope, 2 Russ. 170 ...	464
Dalby v. Hirst, 1 Br. & B. 224 ...	499, 500
Dallman v. King, 4 Bing. N. C. 105 ...	200, 319
Dalton v. Whitem, 3 Q. B. 961; 12 L. J. Q. B. 55 ...	289
Dancer v. Hastings, 4 Bing. 2 ...	226
Dane v. Kirkwall, 8 C. & P. 679 ...	14
Daniel v. Gracie, 6 Q. B. 145; 13 L. J. Q. B. 309; 8 Jur. 708...	147, 189, 221
Daniel v. Stepney, L. R. 9 Ex. 185; 22 W. R. 662 ...	244
Daniel v. Waddington Hill, Cro. Jac. 377 ...	143
Daniell's S. E., <i>Re</i> , 1894, 3 Ch. 503; 64 L. J. Ch. 173; 71 L. T. 563; 43 W. R. 133 ...	47, 50
Daniels v. Davison, 16 Ves. 249 ...	415, 432
Dann v. Spurrier, 7 Ves. 231 ...	51, 110
Dann v. Spurrier, 3 B. & P. 399, 442 ...	450
Danvill v. Roper, 3 Drew. 299 ...	131
Darey v. Askwith, Hob. 234 ...	326
Darby v. Harris, 1 Q. B. 895; 10 L. J. Q. B. 294; 5 Jur. 988...	230, 233, 284, 491
Dargan v. Davies, 2 Q. B. D. 118; 46 L. J. M. C. 122; 35 L. T. 810; 25 W. R. 230 ...	267
Darley v. Tennant, 53 L. T. 257 ...	308
Darlington v. Hamilton, Kay, 550; 23 L. J. Ch. 1000 ...	398, 464
Darlington v. Pritchard, 4 M. & Gr. 783; 12 L. J. C. P. 34; 7 Jur. 677	529
Darlington v. Pulteney, Cowp. 260 ...	57
Darrell v. Tibbitts, 5 Q. B. D. 560; 50 L. J. Q. B. 33; 42 L. T. 797; 29 W. R. 66 ...	359
Dashwood v. Magniac, 1891, 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811	324, 346, 355
Daubuz v. Lavington, 13 Q. B. D. 347; 53 L. J. Q. B. 283; 51 L. T. 206; 32 W. R. 772 ...	524
Davenport v. Reg., 3 App. Cas. 115; 47 L. J. P. C. 8; 37 L. T. 727 ...	464, 469
Davidson v. Allen, 20 L. R. 1r. 16 ...	215, 294
Davies v. Aston, 1 C. B. 746; 14 L. J. C. P. 228 ...	240
Davies v. Davies, 36 C. D. 359 ...	333
Davies v. Davies, 38 C. D. 499; 57 L. J. Ch. 1093; 58 L. T. 514; 36 W. R. 399...	50, 328
Davies v. Fitton, 2 Dr. & War. 225...	187
Davies v. Marshall, 10 C. B. N. S. 697 ...	87
Davies v. Powell, Willes, 46 ...	235
Davies v. Stacey, 12 A. & E. 506 ...	146
Davies v. Underwood, 2 H. & N. 570; 27 L. J. Ex. 113; 3 Jur. N. S. 1223	389
Davis, <i>Re</i> , 20 Q. B. D. 193; 37 W. R. 203 ...	87
Davis v. Artingstall, 49 L. J. Ch. 609 ...	232
Davis v. Burrell, 10 C. B. 821; 15 Jur. 658 ...	369
Davis v. Eyton, 7 Bing. 154 ...	164, 497
Davis v. Gyde, 2 A. & E. 623 ...	215
Davis v. Harford, 22 C. D. 128 ...	47, 57
Davis v. James, 26 C. D. 778; 53 L. J. Ch. 523; 50 L. T. 115; 32 W. R. 406 ...	416

	PAGE
Davis v. Jones, 17 C. B. 625 ; 25 L. J. C. P. 91	142
Davis v. Jones, 2 B. & A. 165	481, 486
Davis v. Corporation of Leicester, 1894, 2 Ch. 208 ; 63 L. J. Ch. 440 ; 70 L. T. 599 ; 42 W. R. 610	35
Davis v. Nisbett, 10 C. B. N. S. 752 ; 31 L. J. C. P. 6	384
Davis v. Shepherd, 1 Ch. 410 ; 35 L. J. Ch. 581 ; 15 L. T. 122	127, 131
Davis v. Trehearne, 6 App. Cas. 460 ; 50 L. J. Q. B. 665 ; 29 W. R. 869 132, 140	
Davison v. Gent, 1 H. & N. 744 ; 26 L. J. Ex. 122 ; 3 Jur. N. S. 342 ..	458
Davison v. Stanley, 4 Burr. 2210	457
Davison v. Wilson, 11 Q. B. 890	519
Dawes v. Dowling, 31 L. T. 65 ; 22 W. R. 770	306
Dawes v. Thomas, '92, 1 Q. B. 414 ; 61 L. J. Q. B. 482 ; 66 L. T. 451 ; 40 W. R. 305	204
Dawson v. Alford, Dyer, 312 a	240
Dawson v. Cropp, 1 C. B. 961 ; 14 L. J. C. P. 281 ; 9 Jur. 944	262
Dawson v. Clementson, 1 T. L. R. 295	332
Dawson v. Dawson, 8 Sim. 346	161
Dawson v. Dyer, 5 B. & Ad. 584	156, 376
Dawson v. Fitzgerald, 1 Ex. D. 257 ; 45 L. J. Ex. 893 ; 35 L. T. 220 ; 24 W. R. 773	156
Dawson v. Lamb, 3 C. & K. 269	459
Dawson v. Linton, 5 B. & A. 521	361
Dawson v. Massey, 1 Ball & B. 219	74
Day v. Day, L. R. 3 P. C. 751 ; 40 L. J. P. C. 35 ; 24 L. T. 356 ; 19 W. R. 1017	89, 520
Day v. Finn, Owen, 133	131
Day v. Singleton, '99, 2 Ch. 320 ; 68 L. J. Ch. 593	396
Dayrell v. Hoare, 12 A. & E. 356	53
Deacon v. South Eastern Ry. Co., 61 L. T. 377	136
Dean v. Allaley, 3 Esp. 11	485
Dear v. Verity, 38 L. J. Ch. 297, 486 ; 21 L. T. 185 ; 17 W. R. 716	115
De Beauvoir v. Owen, 5 Ex. 166 ; 16 M. & W. 547 ; 11 Jur. 458 ...	307
Debenham v. Chambers, 12 T. L. R. 24	72
Debenham v. Digby, 28 L. T. 170 ; 21 W. R. 359	403
De Bussche v. Alt, 8 C. D. 286 ; 47 L. J. Ch. 381 ; 38 L. T. 370 ...	344
Decharms v. Horwood, 10 Bing. 526	64, 229
Deeble v. M'Mullen, 8 Ir. C. L. R. 355	492
Deering v. Farrington, 1 Mod. 113	148
Delaney v. Fox, 1 C. B. N. S. 166 ; 26 L. J. C. P. 5 ; 2 Jur. N. S. 1233	528, 529
Delaney v. Fox, 2 C. B. N. S. 768 ; 26 L. J. C. P. 248	69, 75, 76, 211
Delmege v. Mullins, Ir. R. 9 C. L. 209	198
De Mattos v. Gibson, 4 De G. & J. 276	407
De Medina v. Norman, 9 M. & W. 820	111
De Medina v. Polson, Holt, N. P. 47	94
Denby v. Moore, 1 B. & A. 123	202
Dendy v. Nicholl, 4 C. B. N. S. 376 ; 27 L. J. C. P. 220	460
De Nicholls v. Saunders, L. R. 5 C. P. 589 ; 39 L. J. C. P. 297 ; 22 L. T. 661 ; 18 W. R. 1106	194
Denn v. Cartwright, 4 East, 29	144, 433
Denn v. Dohman, 5 T. R. 641	463
Denn v. Fearnside, 1 Wils. 176	91
Denn v. Rawlins, 10 East, 261	431
Denn v. Walker, Peake, Add. Cas. 194	438
Dennett v. Atherton, L. R. 7 Q. B. 316 ; 41 L. J. Q. B. 165 ; 20 W. R. 442	373, 374
Denton v. Richmond, 1 Cr. & M. 734	199
Deptford (Churchwardens of) v. Sketchley, 8 Q. B. 394 ; 17 L. J. M. C. 17	36
Derby Canal Co. v. Wilmot, 9 East, 360	173
Derby (Earl of) v. Taylor, 1 East, 502	416

	PAGE
Derry v. Peek, 14 App. Cas. 337 ; 58 L. J. Ch. 864 ; 61 L. T. 265 ; 38 W. R. 33	332
Descarlett v. Dennett, 9 Mod. 22	477
Descharmes, <i>Ex parte</i> , 1 Atk. 103	299
De Tabley's Settled Estate, <i>Re</i> , 11 W. R. 936	19
Devonshire (Duke of) v. Barrow Steel Co., 2 Q. B. D. 286 ; 46 L. J. Q. B. 435 ; 36 L. T. 355 ; 25 W. R. 469	361
Devonshire (Duke of) v. Brookshaw, 81 L. T. 83 ; 43 Sol. Journ. 675	337
Devonshire (Duke of) v. Simmons, 11 T. L. R. 52	336
D'Eyncourt v. Gregory, 3 Eq. 382 ; 36 L. J. Ch. 107 ; 15 W. R. 186	482
Dibble v. Bowater, 2 E. & B. 564 ; 22 L. J. Q. R. 396 ; 17 Jur. 1054	194, 222, 249
Digby v. Atkinson, 4 Camp. 275	95, 96, 97, 313
Dinsdale v. Iles, 2 Lev. 88	432
Direct Spanish Telegraph Co. v. Shepherd, 13 Q. B. D. 202 ; 53 L. J. Q. B. 420 ; 51 L. T. 124 ; 32 W. R. 717	366
Dix v. Groom, 5 Ex. D. 91 ; 49 L. J. Q. B. 430 ; 28 W. R. 370	285
Dixon v. Baty, L. R. 1 Ex. 259 ; 12 Jur. N. S. 1024 ; 14 W. R. 836	513
Dixon v. Harrison, Vaugh. 46	228
Dixon v. Smith, 1 Swanst. 457	292
Dobbyn v. Somers, 13 Ir. C. L. R. 293	120, 133
Dobson v. Jones, 5 M. & Gr. 112	87
Dod v. Monger, 6 Mod. 215	260, 269
Dod v. Saxby, 2 Str. 1024	293
Dodd v. Acklom, 6 M. & Gr. 672 ; 13 L. J. C. P. 11 ; 7 Jur. 1017	195, 456, 457
Doddington's Case, 2 Rep. 32 b	128
Dodson v. Sammell, 1 Dr. & Sm. 575	422
Doe v. Abel, 2 M. & S. 541	170
Doe v. Adams, 2 Cr. & J. 232 ; 2 Tyr. 289	69, 165
Doe v. Allen, 3 Taunt. 78	468
Doe v. Allsop, 5 B. & A. 142	400
Doe v. Amey, 12 A. & E. 476	94, 97, 98, 465
Doe v. Archer, 1 B. & P. 531	51
Doe v. Archer, 14 East, 245	442
Doe v. Ashburner, 5 T. R. 163	79, 80
Doe v. Austin, 2 Moo. & Sc. 107 ; 9 Bing. 41	77, 176
Doe v. Baker, 8 Taunt. 241	443
Doe v. Baker, 2 C. & K. 743	319
Doe v. Baneks, 4 B. & A. 401	27, 464
Doe v. Barton, 11 A. & E. 307	211
Doe v. Bateman, 2 B. & A. 168	164
Doe v. Batten, Cowp. 243	447, 450
Doe v. Baytup, 3 A. & E. 188 ; 4 L. J. K. B. 263	75
Doe v. Beckett, 4 Q. B. 601 ; 12 L. J. Q. B. 236	76, 521
Doe v. Bell, 5 T. R. 471	94, 119, 439
Doe v. Benham, 7 Q. B. 976 ; 14 L. J. Q. B. 342 ; 9 Jur. 662	188
Doe v. Benjamin, 9 A. & E. 644	80, 142
Doe v. Benson, 4 B. & A. 588	123, 193
Doe v. Bevan, 3 M. & S. 353	392, 393, 423
Doe v. Biggs, 2 Taunt. 109	439
Doe v. Birch, 1 M. & W. 402	464, 469
Doe v. Bird, 5 B. & C. 855	327
Doe v. Bird, 5 B. & Ad. 695	15
Doe v. Bird, 2 A. & E. 161	334
Doe v. Bird, 6 C. & P. 195	314, 322, 357
Doe v. Bluck, 8 C. & P. 464	450
Doe v. Bold, 11 Q. B. 127	444
Doe v. Bond, 5 B. & C. 855	169
Doe v. Bousfield, 6 Q. B. 492 ; 14 L. J. Q. B. 42	66
Doe v. Bowditch, 8 Q. B. 973 ; 15 L. J. Q. B. 266 ; 10 Jur. 637	168
Doe v. Breach, 6 Esp. 106	465

	PAGE
Doe v. Bridges, 1 B. & Ad. 847	25, 455
Doe v. Brindley, 4 B. & Ad. 84	317
Doe v. Brown, 7 A. & E. 447	78, 82
Doe v. Brown, 2 E. & B. 331 ; 22 L. J. Q. B. 432 ; 17 Jur. 1161	413
Doe v. Browne, 8 East, 165	100, 145, 443
Doe v. Brydges, 2 D. & Ry. 29	466
Doe v. Earl of Burlington, 5 B. & Ad. 507... ..	326, 327
Doe v. Burrough, 6 Q. B. 229	45
Doe v. Burt, 1 T. R. 701	122, 129
Doe v. Butcher, 1 Dougl. 50... ..	51
Doe v. Butler, 2 Esp. 589	441
Doe v. Byron, 1 C. B. 623 ; 14 L. J. C. P. 207	476
Doe v. Cadwallader, 2 B. & Ad. 473	68
Doe v. Calvert, 2 Camp. 387	447
Doe v. Carew, 2 Q. B. 317 ; 11 L. J. Q. B. 5 ; 6 Jur. 457	166
Doe v. Carter, 8 T. R. 57, 300	391, 392
Doe v. Carter, 9 Q. B. 863	384, 520
Doe v. Cartwright, 3 B. & A. 326	105, 117
Doe v. Catomore, 16 Q. B. 745 ; 20 L. J. Q. B. 364 ; 15 Jur. 726	180
Doe v. Cavan, 5 T. R. 567	52
Doe v. Cawdor, 1 Cr. M. & R. 398	449
Doe v. Chamberlaine, 5 M. & W. 14	91
Doe v. Chaplin, 3 Taunt. 120	445
Doe v. Church, 3 Camp. 71	442
Doe v. Clare, 2 T. R. 739	65, 79
Doe v. Clarke, Peake, Add. Cas. 239	216
Doe v. Clarke, 8 East, 185	99, 143
Doe v. Clarke, 7 Q. B. 211 ; 14 L. J. Q. B. 233 ; 9 Jur. 426	80
Doe v. Cockell, 6 N. & M. 179 ; 4 A. & E. 478	35
Doe v. Collinge, 7 C. B. 939 ; 18 L. J. C. P. 305 ; 13 Jur. 791... ..	25, 94
Doe v. Collins, 2 T. R. 502	130
Doe v. Cooper, 1 M. & Gr. 135 ; 9 L. J. C. P. 229	449
Doe v. Courtenay, 11 Q. B. 702 ; 17 L. J. Q. B. 151 ; 12 Jur. 454	457
Doe v. Cox, 11 Q. B. 122 ; 17 L. J. Q. B. 3	90, 93
Doe v. Crago, 6 C. B. 90 ; 17 L. J. C. P. 263	96
Doe v. Crick, 5 Esp. 196	441, 446
Doe v. Crouch, 2 Camp. 449	357
Doe v. Culliford, 4 D. & Ry. 248	441
Doe v. Curwood, 1 Har. & W. 140	470
Doe v. Darby, 8 Taunt. 538	448
Doe v. David, 1 Cr. M. & R. 405 ; 6 C. & P. 614	167
Doe v. Davies, 7 Ex. 89	83, 93, 432
Doe v. Davis, 10 C. B. 821 ; 15 Jur. 155	316, 496
Doe v. Day, 13 East, 241	174
Doe v. Day, 10 East, 427	142
Doe v. Day, 2 Q. B. 147 ; 12 L. J. Q. B. 86 ; 6 Jur. 913	187
Doe v. Derry, 9 C. & P. 494	88, 434
Doe v. Dixon, 9 East, 15	450
Doe v. Dobell, 1 Q. B. 806	439
Doe v. Dodd, 5 B. & Ad. 689	100, 124, 125, 145
Doe v. Donovan, 1 Taunt. 555 ; 2 Camp. 78	436
Doe v. Dunbar, Moo. & M. 10	446
Doe v. Durnford, 2 Cr. & J. 667	401, 471
Doe v. Dyson, Moo. & M. 77... ..	467
Doe v. Edwards, 5 A. & E. 95	82
Doe v. Edwards, 5 B. & Ad. 1065	77
Doe v. Edwards, 1 M. & W. 553	145
Doe v. Eliot, 2 M. & Ry. 433	445
Doe v. Elsam, M. & M. 189	105, 335
Doe v. Evans, 9 M. & W. 48	449
Doe v. Eykins, 1 C. & P. 154	464
Doe v. Eyre, 3 C. B. 557 ; 5 C. B. 713	15

	PAGE
Doe v. Fairclough, 6 M. & S. 40	441
Doe v. Flynn, 1 C. M. & R. 137	462
Doe v. Forster, 13 East, 405	439
Doe v. Forwood, 3 Q. B. 627 ; 11 L. J. Q. B. 321	443
Doe v. Foster, 3 C. B. 215 ; 15 L. J. C. P. 263	75, 80, 81, 94, 441
Doe v. Francis, 2 Moo. & R. 57	78, 96
Doe v. Frankis, 11 A. & E. 792	82
Doe v. Franks, 2 C. & K. 678	467
Doe v. Frowd, 4 Bing. 557	449
Doe v. Fuller, Tyr. & G. 17	75, 447
Doe v. Galloway, 5 B. & Ad. 43	127
Doe v. Gardiner, 12 C. B. 319 ; 21 L. J. C. P. 222	92, 99
Doe v. Geekie, 5 Q. B. 841 ; 13 L. J. Q. B. 239 ; 8 Jur. 360	96, 144, 458
Doe v. Gilbert, 5 Q. B. 423	16
Doe v. Gladwin, 5 Q. B. 953 ; 14 L. J. Q. B. 189 ; 9 Jur. 508	165, 358, 359, 471
Doe v. Godwin, 4 M. & S. 265	165, 166
Doe v. Golding, 6 Moo. 231	191
Doe v. Goldsmith, 2 Cr. & J. 674	165
Doe v. Goldwin, 2 Q. B. 143 ; 10 L. J. Q. B. 275	443, 444
Doe v. Goodier, 10 Q. B. 957 ; 16 L. J. Q. B. 435	83
Doe v. Gower, 17 Q. B. 589 ; 21 L. J. Q. B. 57 ; 16 Jur. 100	449, 521
Doe v. Grafton, 18 Q. B. 496 ; 21 L. J. Q. B. 276 ; 16 Jur. 833	436, 437
Doe v. Greathed, 8 East, 91	127, 128
Doe v. Green, 4 Esp. 198	437
Doe v. Green, 9 A. & E. 658	144, 433
Doe v. Groves, 10 Q. B. 486 ; 16 L. J. Q. B. 297 ; 11 Jur. 558	91
Doe v. Grubb, 10 B. & C. 816	449
Doe v. Guest, 15 M. & W. 160	149, 153
Doe v. Guy, 3 East, 120	418
Doe v. Hales, 7 Bing. 322	68
Doe v. Hall, 5 M. & Gr. 795	445
Doe v. Hare, 2 Cr. & M. 145	206
Doe v. Harvey, 1 B. & C. 426	55
Doe v. Hawthorne, 2 B. & A. 96	42
Doe v. Hazell, 1 Esp. 94	435
Doe v. Hilder, 2 B. & A. 782	434
Doe v. Hiscocks, 5 M. & W. 363	122
Doe v. Hobson, 2 D. & R. 186	173
Doe v. Hogg, 4 D. & Ry. 226	393
Doe v. Hopkinson, 3 D. & Ry. 507	123
Doe v. Houghton, 1 Man. & Ry. 208	179, 450
Doe v. Howard, 11 East, 498	440
Doe v. Hughes, 7 M. & W. 139	440, 444
Doe v. Hughes, 11 Jur. 698	68
Doe v. Hulme, 2 M. & Ry. 433	444
Doe v. Humphreys, 2 East, 237	447
Doe v. Hunt, 1 M. & W. 690	434
Doe v. Ingleby, 15 M. & W. 465	167
Doe v. Inglis, 3 Taunt. 54	431
Doe v. Jackson, 1 Dougl. 175	442, 443
Doe v. Jackson, 2 Stark. 293	314
Doe v. Jackson, 1 B. & C. 448	91
Doe v. Jenkins, 5 Bing. 469	43
Doe v. Jepson, 3 B. & Ad. 402	168, 200
Doe v. Jersey, 1 B. & A. 550	127
Doe v. Johnson, 6 Esp. 10	440
Doe v. Johnson, 1 Stark. 411	470
Doe v. Johnston, M'Cl. & Y. 141	449, 458
Doe v. Jones, 10 B. & C. 718	91, 431
Doe v. Jones, 2 C. & K. 743	168
Doe v. Jones, 4 B. & Ad. 126	314
Doe v. Jones, 15 M. & W. 580	514

	PAGE
Doe v. Jones, 5 Ex. 498 ; 19 L. J. Ex. 405...	471
Doe v. Keeling, 1 M. & S. 95	334
Doe v. Kennard, 12 Q. B. 244 ; 12 Jur. 821	156, 170
Doe v. Rightly, 7 T. R. 63	441
Doe v. Kneller, 4 C. & P. 3	146, 168
Doe v. Lambley, 2 Esp. 635	439
Doe v. Laming, 4 Camp. 73	358, 359, 385
Doe v. Laming, Ry. & M. 36...	393
Doe v. Langdon, 12 Q. B. 711 ; 18 L. J. Q. B. 17 ; 13 Jur. 96	76
Doe v. Lawder, 1 Stark. 308	89, 430
Doe v. Lawrence, 4 Taunt. 23	164
Doe v. Lea, 11 East, 312	123, 437
Doe v. Lewis, 10 B. & C. 673	173
Doe v. Lewis, 5 A. & E. 277	64, 317, 470
Doe v. Lines, 11 Q. B. 402 ; 17 L. J. Q. B. 108 ; 12 Jur. 80	439
Doe v. Lloyd, 3 Esp. 78	121
Doe v. Lock, 2 A. & E. 705	137
Doe v. Long, 9 C. & P. 773	449
Doe v. Lucas, 5 Esp. 153	445
Doe v. Mabblerley, 6 C. & P. 126	419
Doe v. M'Kaeg, 10 B. & C. 721	91, 431
Doe v. Mainby, 10 Q. B. 473 ; 16 L. J. Q. B. 303 ; 11 Jur. 308	433
Doe v. Marchetti, 1 B. & Ad. 715	165, 166, 462
Doe v. Martin, 2 W. Bl. 1148	133
Doe v. Massey, 17 Q. B. 373 ; 20 L. J. Q. B. 434 ; 15 Jur. 1031	513
Doe v. Masters, 2 B. & C. 490	465
Doe v. Matthews, 11 C. B. 675	142, 440
Doe v. Menx, 1 C. & P. 346 ; 4 B. & C. 606	470
Doe v. Maylor, 2 M. & S. 276	212
Doe v. Miles, 1 Stark. 181	434, 450
Doe v. Miller, 5 C. & P. 595	91
Doe v. Mills, 2 A. & E. 17	76
Doe v. Milward, 3 M. & W. 328	439, 448, 455
Doe v. Mizen, 2 Moo. & R. 56	444
Doe v. Moffatt, 15 Q. B. 257 ; 19 L. J. Q. B. 438 ; 14 Jur. 935	94, 440
Doe v. Morphett, 7 Q. B. 577 ; 14 L. J. Q. B. 345 ; 9 Jur. 776	441
Doe v. Morris, 2 Taunt. 52	324
Doe v. Morse, 1 B. & Ad. 365	93, 95, 188
Doe v. Mulliner, 1 Esp. 460	513
Doe v. Murrell, 8 C. & P. 134	431
Doe v. Oliver, 10 B. & C. 181 ; 2 Sm. L. C. 10th ed. 706	75
Doe v. Olley, 12 A. & E. 481	83
Doe v. Ongley, 10 C. B. 25 ; 20 L. J. C. P. 26	68, 445
Doe v. Osborne, 4 Jur. 941	126
Doe v. Oxenham, 7 M. & W. 131	521
Doe v. Palmer, 16 East, 53	447
Doe v. Parker, Gow, 180	462
Doe v. Parkin, 5 Taunt. 321	128
Doe v. Pasquali, Peake, N. P. C. 196	449
Doe v. Paul, 3 C. & P. 613	466
Doe v. Payne, 1 Stark. 86	393
Doe v. Pearsey, 7 B. & C. 304	129
Doe v. Peek, 1 B. & Ad. 428	358, 469
Doe v. Pedigriph, 4 C. & P. 312	117
Doe v. Perrin, 9 C. & P. 467	438
Doe v. Phillips, 2 Bing. 13	170, 463
Doe v. Pittman, 2 Nev. & M. 673	449
Doe v. Poole, 11 Q. B. 713 ; 17 L. J. Q. B. 143 ; 12 Jur. 450	457
Doe v. Porter, 3 T. R. 13	418, 435
Doe v. Powell, 5 B. & C. 308	392, 463
Doe v. Powell, 8 Sc. N. R. 687 ; 7 M. & Gr. 980 ; 14 L. J. C. P. 5 ; 8 Jur. 1123	79, 80

	PAGE
Doe v. Price, 9 Bing. 356	431, 449
Doe v. Price, 8 C. B. 894 ; 19 L. J. C. P. 121	326, 356
Doe v. Pritchard, 5 B. & Ad. 765	164, 167, 468
Doe v. Pullen, 2 Bing. N. C. 749	90
Doe v. Pyke, 5 M. & S. 146	460
Doe v. Quigley, 2 Camp. 505	89, 91, 431
Doe v. Radcliffe, 10 East, 278	54
Doe v. Raffan, 6 Esp. 4	435
Doe v. Ramsbotham, 3 M. & S. 516	77
Doe v. Read, 12 East, 57	444
Doe v. Rees, 4 Bing. N. C. 384	164, 468
Doe v. Rees, 6 C. & P. 610	513
Doe v. Reid, 10 B. & C. 849	339, 340
Doe v. Rendle, 3 M. & S. 99	53
Doe v. Rhodes, 11 M. & W. 600	440
Doe v. Rickarby, 5 Esp. 4	393
Doe v. Ridout, 5 Taunt. 519	460
Doe v. Ries, 8 Bing. 178	80, 124
Doe v. Roberts, 16 M. & W. 778	8
Doe v. Robinson, 3 Bing. N. C. 677 ; 1 Jur. 356	444
Doe v. Robson, 2 C. & P. 245	465
Doe v. Rock, Car. & M. 549 ; 4 M. & Gr. 30 ; 11 L. J. C. P. 194 ; 6 Jur. 266	91, 433
Doe v. Roe, 4 Esp. 185	441
Doe v. Roe, 2 B. & Ad. 922	523
Doe v. Roe, 5 D. & L. 272	467
Doe v. Roe, 7 C. B. 134	466
Doe v. Roe, 1 E. & B. 279	183
Doe v. Rollings, 4 C. B. 188 ; 17 L. J. C. P. 268	43, 449
Doe v. Rowe, Ry. & M. 343 ; 2 C. & P. 246	358
Doe v. Rowlands, 9 C. & P. 734	322
Doe v. Rugeley, 6 Q. B. 107 ; 13 L. J. M. C. 137 ; 8 Jur. 615	333
Doe v. Samuel, 5 Esp. 173	97, 439
Doe v. Sandham, 1 T. R. 705	152, 154
Doe v. Sayer, 3 Camp. 8	431
Doe v. Scott, 6 Bing. 362	438
Doe v. Seaton, 2 Cr. M. & R. 728 ; 5 L. J. Ex. 73	77
Doe v. Sharpley, 15 M. & W. 558	523
Doe v. Shewin, 3 Camp. 134	358
Doe v. Slight, 1 Dowl. 163	183
Doe v. Smaridge, 7 Q. B. 957 ; 14 L. J. Q. B. 327 ; 9 Jur. 781	433
Doe v. Smith, 2 T. R. 436	10, 169
Doe v. Smith, 5 Taunt. 795	392, 406, 423
Doe v. Smith, 6 East, 530	79, 145
Doe v. Smith, 1 Man. & Ry. 137	94
Doe v. Smith, 5 A. & E. 350	441
Doe v. Smith, 8 A. & E. 255 ; 2 Jur. 854	82, 413
Doe v. Smythe, 4 M. & S. 347	75, 76
Doe v. Snowden, 2 W. Bl. 1224	434, 440
Doe v. Somerton, 7 Q. B. 58 ; 14 L. J. Q. B. 210 ; 9 Jur. 775	447
Doe v. Spence, 6 East, 120	440
Doe v. Spiller, 6 Esp. 70	442
Doe v. Spry, 1 B. & A. 617	335
Doe v. Stagg, 5 Bing. N. C. 564 ; 3 Jur. 1127	454
Doe v. Stanion, 1 M. & W. 695	449, 459
Doe v. Stapleton, 3 C. & P. 275	440
Doe v. Steel, 3 Camp. 115	441, 447
Doe v. Steele, 4 Q. B. 663	141
Doe v. Stennett, 2 Esp. 717	92
Doe v. Stephens, 6 Q. B. 208	53, 55
Doe v. Stevens, 3 B. & Ad. 299 ; 1 L. J. K. B. 101	155, 166
Doe v. Steward, 1 A. & E. 300	99

	PAGE
Doe v. Stratton, 4 Bing. 446	94, 440
Doe v. Sturges, 7 Taunt. 217	...61, 418, 419
Doe v. Summersett, 1 B. & Ad. 135	... 444
Doe v. Sutton, 9 C. & P. 706	314, 358, 465
Doe v. Tanriere, 12 Q. B. 998; 18 L. J. Q. B. 49; 13 Jur. 119	27, 94, 95
Doe v. Terry, 4 A. & E. 274	... 35
Doe v. Thomas, 9 B. & C. 288	... 469
Doe v. Thomas, 6 Ex. 854; 20 L. J. Ex. 367	... 432
Doe v. Thomas, 9 A. & E. 556	... 26
Doe v. Thompson, 9 Q. B. 1037; 11 Jur. 1007	... 68
Doe v. Tidbury, 14 C. B. 304; 23 L. J. C. P. 57; 18 Jur. 468	... 513
Doe v. Timothy, 2 C. & K. 351	... 441
Doe v. Tom, 4 Q. B. 615; 12 L. J. Q. B. 264; 7 Jur. 847	... 83
Doe v. Topping, M'Clel. & Y. 544	... 167
Doe v. Tresidder, 1 Q. B. 416; 10 L. J. Q. B. 160	... 66
Doe v. Turford, 3 B. & Ad. 890; 1 L. J. K. B. 262	... 447
Doe v. Turner, 7 M. & W. 226; 9 M. & W. 643	89, 430, 432, 520
Doe v. Ulph, 13 Q. B. 204; 18 L. J. Q. B. 106; 13 Jur. 276	... 358
Doe v. Vince, 2 Camp. 256	... 438
Doe v. Walker, 5 B. & C. 111; 4 L. J. (O. S.) K. B. 93	... 186
Doe v. Walters, 10 B. & C. 626	... 443
Doe v. Wandlass, 7 T. R. 117	... 466
Doe v. Watkins, 7 East, 551	440, 446
Doe v. Watson, 2 Stark. 230	... 77
Doe v. Watt, 1 M. & Ry. 694; 8 B. & C. 308; 6 L. J. (O. S.) K. B. 185	164, 463
Doe v. Watts, 7 T. R. 83	51, 56, 92, 94, 95, 434
Doe v. Webster, 12 A. & E. 442	... 121
Doe v. Weller, 7 T. R. 478	20, 56, 97, 439
Doe v. Weller, 1 Jur. 622	... 192
Doe v. Wells, 10 A. & E. 427; 3 Jur. 820	449, 462
Doe v. Whitehead, 8 A. & E. 571; 2 Jur. 493	... 465
Doe v. Whitroe, D. & Ry. N. P. 1	... 76
Doe v. Whittick, Gow, 195	... 449
Doe v. Wiggins, 4 Q. B. 367; 12 L. J. Q. B. 177; 7 Jur. 529	78, 117
Doe v. Wilkison, 12 A. & E. 743	... 441
Doe v. Williams, 7 C. & P. 322	251, 469
Doe v. Williams, 7 C. & P. 332	... 513
Doe v. Williams, 6 B. & C. 41	... 445
Doe v. Williams, 11 Q. B. 688; 17 L. J. Q. B. 154; 12 Jur. 455	... 137
Doe v. Wilson, 5 B. & A. 363	... 52
Doe v. Withers, 2 B. & Ad. 896; 1 L. J. K. B. 38	151, 152
Doe v. Wood, 2 B. & A. 724	85, 86, 125
Doe v. Wood, 14 M. & W. 682; 15 L. J. Ex. 41; 9 Jur. 1069	92, 93, 95, 418, 459
Doe v. Woodbridge, 9 B. & C. 376	331, 471
Doe v. Woodman, 8 East, 228	... 446
Doe v. Woombwell, 2 Camp. 559	... 439
Doe v. Worsley, 1 Camp. 20	... 385
Doe v. Wrightman, 4 Esp. 5	438, 441, 445
Doe v. Yarborough, 1 Bing. 24	26, 27
Doherty v. Allman, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513	... 327
Dolby v. Iles, 11 A. & E. 335	... 306
Dollen v. Batt, 4 C. B. N. S. 760; 27 L. J. C. P. 281	... 418
Dolling v. Evans, 36 L. J. Ch. 474; 15 L. T. 604; 15 W. R. 391	... 106
Domville v. Colville, Ir. R. 7 C. L. 68	... 338
Domville v. Forde, Ir. R. 7 C. L. 534	... 199
Donegan v. Neill, 16 L. R. Ir. 309	... 308
Donellan v. Read, 3 B. & Ad. 899	124, 191, 458
Donnell v. Church, 4 Ir. Eq. R. 630	... 56
Donnison v. People's Café Co., 45 L. T. 187	... 102
Dorrell v. Collins, Cro. Eliz. 6	... 136

	PAGE
Dougal v. McCarthy, '93, 1 Q. B. 736 ; 62 L. J. Q. B. 462 ; 68 L. T. 699 ; 41 W. R. 484	92, 95
Doughty v. Bowman, 11 Q. B. 444 ; 17 L. J. Q. B. 111 ; 12 Jur. 182...	406
Doughty v. Stiles, Rep. t. Finch, 115	70
Douse v. Earle, 3 Lev. 264 ; 2 Ventr. 126	316
Dowell v. Dew, 1 Y. & C. C. 345 ; 12 L. J. Ch. 158	55, 56, 111
Downs v. Cooper, 2 Q. B. 256 ; 11 L. J. Q. B. 2 ; 6 Jur. 622	78
Doyle v. O'Hara, '99, 1 Ir. R. 113	385
Drake v. Mitchell, 3 East, 251	215
Drake v. Munday, Cro. Car. 207	125, 146, 148
Drant v. Brown, 3 B. & C. 665	116
Drant v. Vause, 1 Y. & C. C. C. 580	160
Draper v. Crofts, 15 M. & W. 166 ; 15 L. J. Ex. 92	513
Draper v. Thompson, 4 C. & P. 84	256
Dressler, <i>Ex parte</i> , 9 C. D. 252 ; 48 L. J. Bk. 20 ; 39 L. T. 377 ; 27 W. R. 144	423
Drew v. Guy, '94, 3 Ch. 25 ; 63 L. J. Ch. 547 ; 71 L. T. 220	335
Drew v. Nuun, 4 Q. B. D. 661	195
Driver, <i>Re</i> , 43 Sol. Journ. 705	296
Drohan v. Drohan, 1 Ball & B. 185...	60
Druce v. Denison, 6 Ves. 385	21
Drummond and Davie's Contract, <i>Re</i> , 1891, 1 Ch. 524	17
Drummond v. Sant, L. R. 6 Q. B. 763 ; 41 L. J. Q. B. 21 ; 25 L. T. 419 ; 20 W. R. 18	522
Drury v. Macnamara, 5 E. & B. 612 ; 25 L. J. Q. B. 5 ; 1 Jur. N. S. 1163	370
Drury v. Molins, 6 Ves. 328	348
Dublin (Corporation of) v. Judge, 11 Ir. L. R. 8	522
Dublin and Wicklow Ry. Co. v. Black, 8 Ex. 181	10
Duck v. Braddyll, 13 Price, 455 ; M'Clel. 217	173
Dudley's Contract, <i>Re</i> Countess of, 35 C. D. 338 ; 56 L. J. Ch. 478 ; 57 L. T. 10 ; 35 W. R. 492	5
Dudley v. Folliott, 3 T. R. 584	371
Dudley v. Warde, Ambbl. 113	485
Duke v. Ashby, 7 H. & N. 600 ; 31 L. J. Ex. 168 ; 8 Jur. N. S. 236 ; 10 W. R. 273	75
Dumergue v. Rumsey, 2 H. & C. 777 ; 33 L. J. Ex. 88 ; 10 Jur. N. S. 155 ; 9 L. T. 775 ; 12 W. R. 205	496
Dunpor's Case, 4 Rep. 119 b	397, 417, 471
Duncan v. Meikleham, 3 C. & P. 172	255
Duncombe v. Hicks, referred to 42 Sol. Journ. p. 393	282
Dunk v. Hunter, 5 B. & A. 322	80, 190, 221
Dunn v. Bryan, Ir. R. 7 Eq. 143	324, 325, 355
Dunn v. Di Nuovo, 3 M. & Gr. 105 ; 10 L. J. C. P. 318...	211
Duppa v. Mayo, 1 Wms. Saund. 275 d	194, 434
Durham, &c., Ry. Co. v. Walker, 2 Q. B. 940 ; 11 L. J. Ex. 442	137
Duxbury v. Sandiford, 78 L. T. 230 ; 80 <i>Ibid.</i> 552	79, 125
Dyas v. Cruise, 2 Jo. & Lat. 460	54, 55, 56
Dyer v. Bowley, 2 Bing. 94	206
Dyke, <i>Ex parte</i> , 22 C. D. 410 ; 52 L. J. Ch. 570 ; 48 L. T. 303 ; 31 W. R. 278	300, 424, 425, 467
Dyke v. Taylor, 3 D. F. & J. 467 ; 30 L. J. Ch. 281	393
Dymock v. Showell's Brewery Co., 79 L. T. 329	385
Dyne v. Nutley, 14 C. B. 122	127, 128
Dynevor, &c., Collieries Co., <i>Re</i> , 11 C. D. 605	39
Dynevor v. Tennant, 13 App. Cas. 279 ; 57 L. J. Ch. 1078 ; 59 L. T. 5 ; 37 W. R. 193	137, 453, 461
Eadie v. Addison, 52 L. J. Ch. 80 ; 47 L. T. 543 ; 31 W. R. 320	103, 154
Eagleton v. Gutteridge, 11 M. & W. 465 ; 12 L. J. Ex. 359	170, 219, 258
Eardley v. Granville, 3 C. D. 826	140
Earle v. Maugham, 14 C. B. N. S. 626	360

	PAGE
East v. Harding, Cro. Eliz. 498	66
East v. Ryal, 2 P. W. 284	40
East and West India Dock Co., <i>Ex parte</i> , 17 C. D. 759 ; 50 L. J. Ch. 789 ; 45 L. T. 6 ; 30 W. R. 22	425
Eastcourt v. Weeks, 1 Salk. 186	66
Easterby v. Sampson, 6 Bing. 644	149
Eastern Telegraph Co., <i>Lim. v. Dent</i> , '99, 1 Q. B. 835 ; 68 L. J. Q. B. 564 ; 78 L. T. 713 ; 80 <i>Ibid.</i> 459	395, 477
Easton v. Penny, 67 L. T. 290 ; 41 W. R. 72	46, 52, 444, 457
Easton v. Pratt, 2 H. & C. 676 ; 33 L. J. Ex. 233	54
Easton Estate Co. v. Western Waggon Co., 54 L. T. 735	239
Eaton v. Lyon, 3 Ves. 690	162, 163
Eaton v. Southby, Willes, 131	235, 284
Ebbetts v. Conquest, '95, 2 Ch. 377 ; 44 W. R. 56	322
Eccles v. Mills, '98, A. C. 360 ; 67 L. J. P. C. 25 ; 78 L. T. 206 ; 46 W. R. 398...	417
Ecclesiastical Commissioners v. Merral, L. R. 4 Ex. 162 ; 38 L. J. Ex. 93 ; 20 L. T. 573 ; 17 W. R. 676	23, 94, 97
Ecclesiastical Commissioners v. O'Connor, 9 Ir. C. L. R. 242	212
Ecclesiastical Commissioners v. Rowe, 5 App. Cas. 736 ; 49 L. J. Q. B. 771 ; 43 L. T. 353 ; 29 W. R. 159	522
Ecclesiastical Commissioners v. Treemer, '93, 1 Ch. 166 ; 62 L. J. Ch. 119 ; 68 L. T. 11 ; 41 W. R. 166	462, 522
Ecclesiastical Commissioners v. Wodehouse, 1895, 1 Ch. 552 ; 64 L. J. Ch. 329 ; 72 L. T. 257 ; 43 W. R. 395	29
Eccleston v. Clipsham, 1 Wms. Saund. 153	156
Edgar v. Blick, 1 Stark. 464	116
Edge v. Boileau, 16 Q. B. D. 117 ; 55 L. J. Q. B. 90 ; 53 L. T. 907 ; 34 W. R. 103	156, 376
Edge v. Pemberton, 12 M. & W. 187 ; 13 L. J. Ex. 48	324
Edge v. Strafford, 1 Cr. & J. 391	104, 118, 187, 306
Edgson v. Cardwell, L. R. 8 C. P. 647 ; 28 L. T. 819	288
Edmonds, <i>Ex parte</i> , 48 L. T. 77	424
Edmondson v. Nuttall, 17 C. B. N. S. 280	288, 289
Edmunds v. Pinniger, 7 Q. B. 558 ; 14 L. J. Q. B. 273	529
Edmunds v. Wallingford, 14 Q. B. D. 811 ; 54 L. J. Q. B. 305 ; 52 L. T. 720 ; 33 W. R. 647	218
Edwardes' Menu Co. v. Chudleigh, 14 T. L. R. 47	106
Edwards, <i>Re</i> , 10 C. D. 605	13
Edwards v. Carter, 1893, A. C. 360 ; 63 L. J. Ch. 100 ; 69 L. T. 153	7, 10
Edwards v. Dick, 4 B. & A. 217	27
Edwards v. Hodges, 15 C. B. 477 ; 24 L. J. M. C. 81 ; 1 Jur. N. S. 91 ; 3 W. R. 167	530
Edwards v. Kelly, 6 M. & S. 204	217
Edwards v. Millbank, 4 Drew, 606 ; 29 L. J. Ch. 45	54
Edwards v. Rees, 7 C. & P. 340	208
Edwards v. West, 7 C. D. 858 ; 47 L. J. Ch. 463 ; 38 L. T. 481 ; 26 W. R. 507	161
Edwards v. Wickwar, 1 Eq. 403 ; 35 L. J. Ch. 309 ; 14 W. R. 363	413
Edwick v. Hawkes, 18 C. D. 199 ; 50 L. J. Ch. 577 ; 45 L. T. 168 ; 29 W. R. 913...	165, 339, 340, 518, 519
Eldridge v. Stacey, 15 C. B. N. S. 458 ; 10 Jur. N. S. 517 ; 9 L. T. 291 ; 12 W. R. 51	258, 268
Elgar v. Watson, Car. & M. 494	96
Elias v. Griffith, 8 C. D. 521 ; 48 L. J. Ch. 203 ; 38 L. T. 871 ; 26 W. R. 869	325
Elias v. Snowdon Slate Quarries Co., 4 App. Cas. 454 ; 48 L. J. Ch. 811 ; 41 L. T. 289 ; 28 W. R. 54	325
Eliot v. Mayor of Bristol, 71 L. T. 659	77
Elliott, <i>Ex parte</i> , 3 M. & A. 664	299
Elliott v. Ince, 7 D. M. & G. 475	14
Elliott v. Johnson, L. R. 2 Q. B. 120 ; 36 L. J. Q. B. 44 ; 15 W. R. 253	404

	PAGE
<i>Ellis v. Peachy</i> , 18 L. J. Q. B. 137	525
<i>Ellis v. Taylor</i> , 8 M. & W. 415	273
<i>Ellis v. Rowbotham</i> , 80 L. T. 328 ; 15 T. L. R. 328	214
<i>Ellis v. Wright</i> , 76 L. T. 522	218
<i>Elmore v. Pirie</i> , 57 L. T. 333	116
<i>Elphinstone (Lord) v. Monkland Iron Co.</i> , 11 App. Cas. 332 ; 35 W. R. 17	159, 199, 392, 396
<i>Elston v. Rose</i> , 3 B. & S. 509 ; L. R. 4 Q. B. 4 ; 38 L. J. Q. B. 6 ; 19 L. T. 280 ; 17 W. R. 52	526
<i>Elwes v. Brigg Gas Co.</i> , 33 C. D. 562 ; 55 L. J. Ch. 734 ; 55 L. T. 831 ; 35 W. R. 192	139
<i>Elwes v. Maw</i> , 3 East, 38	484, 485, 486, 488, 490, 491
<i>Elworthy v. Sandford</i> , 3 H. & C. 330 ; 34 L. J. Ex. 42 ; 10 L. T. 654 ; 12 W. R. 1008	183
<i>Emanuel and Simmonds, Re</i> , 33 C. D. 40 ; 55 L. J. Ch. 710 ; 55 L. T. 79 ; 34 W. R. 613	184
<i>Emery and Barnett, Re</i> , 4 C. B. N. S. 423 ; 27 L. J. C. P. 216... ..	211
<i>Emmerson v. Heelis</i> , 2 Taunt. 38	108
<i>Emott v. Cole</i> , Cro. Eliz. 255	213
<i>Empson v. Soden</i> , 4 B. & Ad. 655	485
<i>Emuss v. Smith</i> , 2 De G. & Sm. 722	160
<i>Engel v. South Metrop. Brewing Co.</i> , 1891, W. N. p. 31	236
<i>England v. Cowley</i> , L. R. 8 Ex. 126 ; 42 L. J. Ex. 80 ; 28 L. T. 67 ; 21 W. R. 337	248, 251
<i>England v. Marsden</i> , L. R. 1 C. P. 529	218
<i>England v. Shearburn</i> , 52 L. T. 22	501
<i>England v. Slade</i> , 4 T. R. 682	77
<i>Enys v. Donnithorne</i> , 2 Barr. 1190... ..	142, 157
<i>Erle and Webster's Contract, Re</i> , 24 C. D. 144	49
<i>Erne (Earl of) v. Armstrong</i> , Ir. R. 6 C. L. 279 ; 20 W. R. 370	444
<i>Errington v. Metrop. Ry. Co.</i> , 19 C. D. 559	131, 132
<i>Erskine v. Adame</i> , 8 Ch. 756 ; 47 L. J. Ch. 849 ; 29 L. T. 234 ; 21 W. R. 802	123, 124, 333, 353, 383
<i>Erskine v. Armstrong</i> , 20 L. R. Ir. 296	107
<i>Espir v. Todd</i> , C. & E. 154	88
<i>Espley v. Wilkes</i> , L. R. 7 Ex. 298 ; 41 L. J. Ex. 241 ; 26 L. T. 918	136
<i>Esron v. Nicholas</i> , 1 De G. & Sm. 118	6
<i>Essex v. Daniel</i> , L. R. 10 C. P. 538	178
<i>Etherton v. Popplewell</i> , 1 East, 139... ..	265, 271
<i>Evans, Re</i> , 2 My. & K. 318	6
<i>Evans v. Angell</i> , 26 Beav. 202	128
<i>Evans v. Curtis</i> , 2 C. & P. 296	108
<i>Evans v. Davis</i> , 10 C. D. 747 ; 48 L. J. Ch. 223 ; 39 L. T. 391 ; 27 W. R. 285	166, 334, 469
<i>Evans v. Elliott</i> , 5 A. & E. 142	225, 272, 283
<i>Evans v. Elliott</i> , 9 A. & E. 342	68, 69
<i>Evans v. Jackson</i> , 8 Sim. 207	59
<i>Evans v. Matthias</i> , 7 E. & B. 590 ; 26 L. J. Q. B. 309 ; 3 Jur. N. S. 793	73, 226
<i>Evans v. Roberts</i> , 5 B. & C. 829 ; 4 L. J. (O. S.) K. B. 313	103, 497
<i>Evans v. Vaughan</i> , 4 B. & C. 261	375, 377
<i>Evans v. Walshe</i> , 2 Sch. & L. 519	390
<i>Evans v. Wright</i> , 2 H. & N. 527 ; 27 L. J. Ex. 50	281
<i>Evans v. Wyatt</i> , 43 L. T. 176 ; 44 J. P. 767	470
<i>Evelyn v. Chichester</i> , 3 Burr. 1717	10
<i>Evelyn v. Raddish</i> , 7 Taunt. 411	317
<i>Everett v. Wilkins</i> , 29 L. T. 846	11
<i>Ewart v. Graham</i> , 7 H. L. C. 331	383
<i>Ewer v. Moyle</i> , Cro. Eliz. 771	211
<i>Exall v. Partridge</i> , 8 T. R. 308	218
<i>Exhall Coal Mining Co., Re</i> , 4 D. J. & S. 377 ; 33 L. J. Ch. 595 ; 11 L. T. 526 ; 13 W. R. 219	302

	PAGE
Eyre v. Shaftesbury, 2 P. W. 102	9
Eyton v. Jones, 21 L. T. 789	397
Fabian v. Winston, Cro. Eliz. 209	466
Fagr v. Dobie, 3 Y. & C. Ex. 96	409
Fairlamb v. Beaumont, 31 Sol. Journ. p. 272	253
Fairecloth, <i>Re</i> , 13 C. D. 307	12
Fairtlough v. Whitmore, 64 L. J. Ch. 386; 72 L. T. 354; 43 W. R. 421	338
Falmouth (Earl of) v. Roberts, 9 M. & W. 469	180
Farewell v. Dickenson, 6 B. & C. 251	189
Farlow v. Stevenson, 15 T. L. R. 249	367
Farmer v. Rogers, 2 Wils. 26	455
Farnell's Settled Estate, <i>Re</i> , 33 C. D. 599; 35 W. R. 250	44
Farquhaison v. Morgan, '94, 1 Q. B. 552; 63 L. J. Q. B. 474; 70 L. T. 152; 42 W. R. 306	508
Farrance v. Elkington, 2 Camp. 591	442, 518
Farrant v. Lovel, 3 Atk. 723... ..	329
Farrant v. Olmius, 3 B. & A. 692	199
Farrall v. Hilditch, 5 C. B. N. S. 840	149
Farrall v. Davenport, 3 Giff. 363; affd. 8 Jur. N. S. 1043	110
Farrer v. Nelson, 15 Q. B. D. 258; 54 L. J. Q. B. 385; 52 L. T. 766; 33 W. R. 800	383
Faulkner v. Llewellyn, 9 L. T. 251, 557; 12 W. R. 193	203
Faulkner v. Llewellyn, 31 L. J. Ch. 549; 10 W. R. 378	109
Faviell v. Gaskoin, 7 Ex. 273; 21 L. J. Ex. 85	501
Fawcett v. Strickland, Willes, 57	64
Fawkner v. Booth, 10 T. L. R. 83	384
Fell v. Whittaker, L. R. 7 Q. B. 120; 41 L. J. Q. B. 78; 25 L. T. 880; 20 W. R. 317	252, 261, 262
Female Orphan Asylum, <i>Re</i> , 17 L. T. 59; 15 W. R. 1056	24
Fenn v. Smart, 12 East, 444	461
Fenner v. Duplock, 2 Bing. 10	78, 216
Fenny v. Child, 2 M. & S. 255	65, 79, 125
Fenton v. Clegg, 9 Ex. 680; 23 L. J. Ex. 197	419
Fenton v. Logan, 9 Bing. 676	240
Feret v. Hill, 15 C. B. 207; 23 L. J. C. P. 185; 18 Jur. 1014	331
Ferguson v. —, 2 Esp. 590	308
Ferguson v. Cornish, 2 Burr. 1032; 3 T. R. 463, n.	100
Ferraby v. Hobson, 2 Phil. 261	40
Festing v. Taylor, 2 B. & S. 217	363
Few v. Perkins, L. R. 2 Ex. 92; 36 L. J. Ex. 54; 16 L. T. 62; 15 W. R. 713	471
Field, <i>Re</i> , 29 C. D. 608; 54 L. J. Ch. 661; 52 L. T. 480; 33 W. R. 553	184
Field v. Adames, 12 A. & E. 649	234
Field v. Mitchell, 6 Esp. 71	262
Fielden v. Slater, 7 Eq. 523; 38 L. J. Ch. 379; 20 L. T. 112; 17 W. R. 485	336, 408
Fielden v. Tattersall, 7 L. T. 718	199, 349
Filby v. Hounsel, '96, 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270; 45 W. R. 232	103, 106
Fildes v. Hooker, 2 Mer. 424	111
Filliter v. Phippard, 11 Q. B. 347; 17 L. J. Q. B. 89	309
Finch's Case, 6 Rep. 63 a	60
Finch v. Miller, 5 C. B. 428	95, 98, 191, 274
Finch v. Underwood, 2 C. D. 310; 45 L. J. Ch. 522; 34 L. T. 779; 24 W. R. 657	156, 163
Findon v. McLaren, 6 Q. B. 891; 14 L. J. Q. B. 183; 9 Jur. 369	231
Finlay v. Bristol and Exeter Ry. Co., 7 Ex. 409; 21 L. J. Ex. 117	23, 94, 95
Finley, <i>Re</i> , 21 Q. B. D. 475; 57 L. J. Q. B. 626; 60 L. T. 134; 37 W. R. 6	427
Firth v. Purvis, 5 T. R. 432... ..	269

	PAGE
Fish v. Champion, 2 Rol. Abr. 498	458
Fisher v. Algar, 2 C. & P. 374	262, 280, 281
Fisher v. Dixon, 12 Cl. & F. 312; 9 Jur. 883	482, 484
Fisher v. Marsh, 6 B. & S. 411; 34 L. J. Q. B. 177; 11 Jur. N. S. 795; 12 L. T. 604; 13 W. R. 834	306
Fishwick v. Milnes, 4 Ex. 825; 19 L. J. Ex. 153	280
Fishmongers' Co. v. Robertson, 5 M. & Gr. 131	24
Fitz v. Hles, '93, 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108	334
Fitzgerald v. Lord Portarlington, Jones' Ex. R. 431	104
Fitzherbert v. Shaw, 1 H. Bl. 258	485, 491, 494
Fitzmaurice v. Bayley, 8 E. & B. 664; 9 H. L. C. 78; 27 L. J. Q. B. 143; 6 Jur. N. S. 1215; 8 W. R. 750	71, 92, 106
Fitzpatrick v. Waring, 11 L. R. Ir. 35	59
Flarty v. Odlum, 3 T. R. 681	3
Fleetwood v. Hull, 23 Q. B. D. 35; 58 L. J. Q. B. 341; 60 L. T. 790; 37 W. R. 714	339, 405, 414
Fleming v. Gooding, 10 Bing. 549	75
Fleming v. Snook, 5 Beav. 250	347
Fletcher v. Nokes, '97, 1 Ch. 271; 66 L. J. Ch. 177; 76 L. T. 107; 45 W. R. 471	474
Fletcher v. Marillier, 9 A. & E. 457	248
Fletcher v. Saunders, 1 Moo. & R. 375	275
Flight v. Barton, 3 My. & K. 282	388
Flight v. Bentley, 7 Sim. 149	417
Flight v. Clarke, 13 M. & W. 155	330
Flight v. Glossop, 2 Bing. N. C. 125	406
Flight v. Provident Association of London, 11 T. L. R. 391; 12 <i>Ibid.</i> 51	123
Flint v. Brandon, 8 Ves. 159	344
Flitters v. Allfrey, L. R. 10 C. P. 29; 44 L. J. C. P. 73; 31 L. T. 878; 23 W. R. 442	529
Floyd v. Lyons & Co., '97, 1 Ch. 633; 66 L. J. Ch. 350; 76 L. T. 251; 45 W. R. 435	566
Flureau v. Thornhill, 2 W. Bl. 1078	113
Foley v. Addenbrooke, 13 M. & W. 174	343, 492, 495
Foley v. Addenbrooke, 4 Q. B. 197; 12 L. J. Q. B. 163	157
Foquet v. Moor, 7 Ex. 870; 22 L. J. Ex. 35	191, 457
Forbes v. Moffatt, 18 Ves. 390	453
Ford's Settled Estate, <i>Re</i> , 8 Eq. 309	44
Ford v. Ager, 2 H. & C. 279; 32 L. J. Ex. 269; 9 Jur. N. S. 804; 8 L. T. 546; 11 W. R. 1073	76
Ford v. Metrop. Ry. Co., 17 Q. B. D. 12; 55 L. J. Q. B. 296; 54 L. T. 718; 34 W. R. 426	134
Ford v. Tiley, 6 B. & C. 325	113
Ford v. Tynte, 31 L. J. Ch. 177	235
Fordham v. Akers, 4 B. & S. 578; 33 L. J. Q. B. 67	285
Forer v. Nash, 35 Beav. 167	113, 399
Forrester's Case, 1 Sid. 41	8
Forster v. Cookson, 1 Q. B. 419; 10 L. J. Q. B. 167; 5 Jur. 1083	292
Forster v. Rowland, 7 H. & N. 103; 30 L. J. Ex. 396	102, 105
Foster v. Hilton, 1 Dowl. 35	294, 295
Foster v. Mapes, Cro. Eliz. 212	372
Foster v. Pierson, 4 T. R. 617	211, 371
Foster v. Reeves, '92, 2 Q. B. 255; 61 L. J. Q. B. 763; 67 L. T. 537; 40 W. R. 695	82
Foster v. Wheeler, 38 C. D. 130; 57 L. J. Ch. 871; 59 L. T. 15; 37 W. R. 40	113
Foulger v. Taylor, 5 H. & N. 202; 29 L. J. Ex. 154	248, 248
Fowell v. Tranter, 3 H. & C. 458; 34 L. J. Ex. 6; 11 L. T. 317; 13 W. R. 145	450
Fowkes v. Joyee, 2 Vern. 129; 3 Lev. 260	219, 231, 233
Fowle v. Freeman, 9 Ves. 351	108
Fowle v. Welsh, 1 B. & C. 29	372

	PAGE
Fowler v. Johnstone, 8 T. L. R. 327	325.
Fox v. Dalby, L. R. 10 C. P. 285; 44 L. J. C. P. 42; 31 L. T. 478; 23 W. R. 244	87
Fox v. Swann, Sty. 482	393.
Frame v. Dawson, 14 Ves. 386	110
Francis v. Doe, 4 M. & W. 331	76.
Francis v. Hayward, 22 C. D. 177; 52 L. J. Ch. 291; 48 L. T. 297; 31 W. R. 488	130.
Francis v. Wigzell, 1 Madd. 258	16.
Francis v. Wyatt, 1 W. Bl. 483; 3 Barr. 1498	231, 233.
Franklin v. Carter, 1 C. B. 750; 14 L. J. C. P. 241; 9 Jur. 874	201
Franklin v. Howes, 24 L. T. 348	414
Franklinski v. Ball, 34 L. J. Ch. 153; 33 Beav. 560	69
Freeman v. Roshier, 13 Q. B. 780; 18 L. J. Q. B. 340; 13 Jur. 881	256
Freeman v. West, 2 Wils. 165	144
French v. Macale, 2 Dr. & War. 269; 4 Ir. Eq. R. 568... ..	199, 200
French v. Patton, 9 East, 351	180
French v. Phillips, 1 H. & N. 564; 26 L. J. Ex. 82; 2 Jur. N. S. 1169	253.
Friary, Holroyd & Co. v. Singleton, '99, 1 Ch. 86; 68 L. J. Ch. 13; 47 W. R. 93; app., '99, 2 Ch. 261; 68 L. J. Ch. 622; 81 L. T. 101; 47 W. R. 662	160, 403.
Friend v. Shaw, 20 Q. B. D. 374; 57 L. J. Q. B. 225; 58 L. T. 89; 36 W. R. 236	525.
Frogley v. E. Lovelace, Johns. 333	116, 180.
Frosel v. Welch, Cro. Jac. 403	64
Frusher v. Lee, 10 M. & W. 709; 12 L. J. Ex. 321	278
Fry v. Fry, 27 Beav. 146; 28 L. J. Ch. 593	423
Fryer v. Coombs, 11 A. & E. 403	176.
Fryett v. Jeffreys, 1 Esp. 393	471
Fryman's Estate, <i>Re</i> , 38 C. D. 468; 57 L. J. Ch. 862; 58 L. T. 872; 36 W. R. 631	300.
Fulder, <i>Ex parte</i> , 8 Dowl. P. C. 535; 4 Jur. 507	531
Fuller, <i>Ex parte</i> , 13 L. J. M. C. 141; 8 Jur. 604	246.
Fuller v. Abbot, 4 Taunt. 105	201, 363
Fulmerstone v. Steward, Plowd. 106	457
Furley v. Wood, 1 Esp. 198	438.
Furneaux v. Fotherby, 4 Camp. 136	249, 291
Furness v. Bond, 4 T. L. R. 457	80, 120
Furness v. Meek, 27 L. J. Ex. 34	179.
Furness Ry. Co. v. Cumberland Building Society, 52 L. T. 144	136
Furnival v. Crew, 3 Atk. 83	162
Furnivall v. Grove, 8 C. B. N. S. 496; 30 L. J. C. P. 3	209, 456.
Fury v. Smith, 1 Huds. & Br. 735	181
Gabell v. Shevell, 5 Taunt. 81	201
Gabriel v. Blankenstern, 13 Q. B. D. 684; 33 W. R. 151	425.
Gage v. Acton, 1 Salk. 325	215.
Gage v. Collins, L. R. 2 C. P. 381; 36 L. J. C. P. 144; 15 W. R. 568	298
Gage v. Smith, Godb. 209	325
Gale v. Bates, 3 H. & C. 84; 33 L. J. Ex. 235; 10 Jur. N. S. 734; 10 L. T. 304; 12 W. R. 715	348
Gambrell v. Earl of Falmouth, 4 A. & E. 73	263
Gamon v. Vernon, 2 Lev. 231	402
Gandy v. Jubber, 5 B. & S. 78; 9 B. & S. 15; 33 L. J. Q. B. 151; 10 Jur. N. S. 652	93, 311
Gange v. Lockwood, 2 F. & F. 115	314
Gardiner v. Colyer, 12 W. R. 979; 10 L. T. 715... ..	383
Gardiner v. Norman, Cro. Jac. 617	21
Gardiner v. Williamson, 2 B. & Ad. 336	120, 121, 189
Gardner v. Furness Ry. Co., 47 J. P. 232	368
Gardner v. Ingram, 61 L. T. 729	433, 442

Garrard <i>v.</i> Frankel, 30 Beav. 445 ; 31 L. J. Ch. 604 ; 8 Jur. N. S.	985
	121, 187
Garrard <i>v.</i> Tuck, 8 C. B. 231 ; 18 L. J. C. P. 338	... 92
Gaskell <i>v.</i> King, 11 East, 165	... 201, 363
Gaslight and Coke Co. <i>v.</i> Hardy, 17 Q. B. D. 619 ; 56 L. J. Q. B. 168 ;	
55 L. T. 585 ; 35 W. R. 50	... 239
Gaslight and Coke Co. <i>v.</i> Holloway, 52 L. T. 434...	... 508
Gaslight and Coke Co. <i>v.</i> Towse, 35 C. D. 519 ; 56 L. J. Ch. 889 ; 56	
L. T. 602	... 55, 58, 113
Gaslight Co. <i>v.</i> Turner, 6 Bing. N. C. 324...	... 158, 330
Gauntlett <i>v.</i> King, 3 C. B. N. S. 59	... 240, 256
Gawler <i>v.</i> Chaplin, 2 Ex. 503 ; 18 L. J. Ex. 42	... 293
Gearns <i>v.</i> Baker, 10 Ch. 355 ; 44 L. J. Ch. 334 ; 33 L. T. 86 ; 23 W. R. 543	2
Gebhardt <i>v.</i> Saunders, 1892, 2 Q. B. 452 ; 67 L. T. 684 ; 40 W. R. 571	361
Gee, <i>Re</i> , 24 Q. B. D. 65 ; 59 L. J. Q. B. 16 ; 61 L. T. 645 ; 38 W. R. 143	424
Geekie <i>v.</i> Monk, 1 C. & K. 307	... 458
General Assurance Co. <i>v.</i> Worsley, 64 L. J. Q. B. 253 ; 72 L. T. 358	... 441
General Share and Trust Co. <i>v.</i> Wetley Brick Co., 20 C. D. 260 ; 30	
W. R. 445	... 168, 304, 467
Gent <i>v.</i> Cutts, 11 Q. B. 288 ; 17 L. J. Q. B. 55 ; 12 Jur. 113	... 286
Gentle <i>v.</i> Faulkner, 68 L. J. Q. B. 848 ; 15 T. L. R. 466	... 393
German <i>v.</i> Chapman, 7 C. D. 271 ; 47 L. J. Ch. 250 ; 37 L. T. 685 ; 26	
W. R. 149...	... 338
Gerrard <i>v.</i> Clifton, 7 T. R. 676	... 208
Gerrard <i>v.</i> O'Reilly, 3 Dr. & War. 414	... 199
Gethin <i>v.</i> Wilks, 2 Dowl. 189	... 296
Gibbins <i>v.</i> Buckland, 1 H. & C. 736	... 525
Gibbins <i>v.</i> Howell, 3 Madd. 469	... 73
Gibbon <i>v.</i> Kirk, 1 Q. B. 850 ; 6 Jur. 99	... 306
Gibbons <i>v.</i> Chambers, C. & F. 577 ; 1 T. L. R. 530	... 207, 330
Gibbons <i>v.</i> Moulton, Finch, 346	... 15
Gibbs <i>v.</i> Cruikshank, L. R. 8 C. P. 454 ; 42 L. J. C. P. 273 ; 28 L. T.	
735 ; 21 W. R. 734	... 283, 284
Gibbs <i>v.</i> Cruikshank, 28 L. T. 104	... 222
Gibson <i>v.</i> Doeg, 2 H. & N. 615 ; 27 L. J. Ex. 37...	... 343
Gibson <i>v.</i> Hammersmith Ry. Co., 2 Dr. & Sm. 603 ; 32 L. J. Ch. 337 ;	
9 Jur. N. S. 221 ; 8 L. T. 43 ; 11 W. R. 229...	479, 484, 485, 486, 487
Gibson <i>v.</i> Holland, L. R. 1 C. P. 1	... 105
Gibson <i>v.</i> Ireson, 3 Q. B. 39	... 231
Gibson <i>v.</i> Searl, Cro. Jac. 84, 176	... 2
Giddens <i>v.</i> Dodd, 3 Drew. 485 ; 25 L. J. Ch. 451	... 448, 451
Gilbertson <i>v.</i> Richards, 4 H. & N. 277 ; 5 <i>Ibid.</i> 453 ; 28 L. J. Ex. 158 ;	
29 <i>Ibid.</i> 213 ; 6 Jur. N. S. 672	... 191
Giles <i>v.</i> Hooper, Carth. 135	... 146, 148, 364
Giles <i>v.</i> Spencer, 3 C. B. N. S. 244 ; 26 L. J. C. P. 237 ; 3 Jur. N. S.	
820	... 219, 252
Gillam <i>v.</i> Arkwright, 16 L. T. O. S. 88	... 248
Gillard <i>v.</i> Cheshire Lines Committee, 32 W. R. 943	... 187
Gillingham <i>v.</i> Gwyer, 16 L. T. 640	... 222, 244
Gilman <i>v.</i> Elton, 3 Br. & B. 75	... 231
Gimbart <i>v.</i> Pelah, 2 Str. 1272	... 267
Girardy <i>v.</i> Richardson, 1 Esp. 13	... 330
Gisbourn <i>v.</i> Hurst, 1 Salk. 249	... 231, 232
Gjers, <i>Re</i> , '99, 2 Ch. 54 ; 68 L. J. Ch. 442 ; 80 L. T. 689 ; 47 W. R. 535	328
Gladman <i>v.</i> Plumer, 15 L. J. Q. B. 79 ; 10 Jur. 109	... 69, 219
Glasgow Corporation <i>v.</i> Glasgow Tramway Co., '98, A. C. 631	... 368
Glasgow (Lord Provost of) <i>v.</i> Fairie, 13 App. Cas. 657 ; 58 L. J. P. C.	
33 ; 60 L. T. 274 ; 37 W. R. 627	... 131
Gledhill <i>v.</i> Hunter, 14 C. D. 492 ; 49 L. J. Ch. 333 ; 42 L. T. 392 ; 28	
W. R. 530	... 523
Glegg, <i>Ex parte</i> , 19 C. D. 7 ; 51 L. J. Ch. 367 ; 45 L. T. 484 ; 30	
W. R. 144	... 425

	PAGE
Glen v. Dungey, 4 Ex. 61 ; 18 L. J. Ex. 359	117
Glenham v. Hanby, 1 Ld. Raym. 739	139, 325
Glover v. Cope, 3 Lev. 326 ; 4 Mod. 80	416
Glynn v. Thomas, 11 Ex. 870 ; 25 L. J. Ex. 125 ; 2 Jur. N. S. 378	252, 253
Goddard's Case, 2 Rep. 4 b	125
Godfrey v. Jacobs, 30 Sol. Journ. 539	502
Goff v. Harris, 5 M. & Gr. 573 ; 12 L. J. C. P. 273	136
Gooch v. Clutterbuck, '99, 2 Q. B. 148 ; 68 L. J. Q. B. 808 ; 81 L. T. 9 ; 47 W. R. 609	411
Good, <i>Ex parte</i> , 13 Q. B. D. 731 ; 54 L. J. Q. B. 96 ; 51 L. T. 876 ; 33 W. R. 22	426
Goode v. Howells, 4 M. & W. 198	440
Goodland v. Blewitt, 1 Camp. 477	195
Goodland v. Ewing, C. & E. 43	422
Goodright v. Cator, 2 Dougl. 477	467
Goodright v. Cordwent, 6 T. R. 219... ..	447
Goodright v. Davids, Cowp. 803	468
Goodright v. Mark, 4 M. & S. 30	450
Goodright v. Richardson, 3 T. R. 462	100, 141, 450
Goodright v. Straphan, Cowp. 201	20
Goodright v. Vivian, 8 East, 190	325
Goodtitle v. Funnican, 2 Doug. 565	55
Goodtitle v. Gibbs, 5 B. & C. 709	141
Goodtitle v. Herbert, 4 T. R. 680	91, 431
Goodtitle v. Paul, 2 Burr. 1089	130
Goodtitle v. Saville, 16 East, 87	165
Goodtitle v. Southern, 1 M. & S. 299	127
Goodtitle v. Woodward, 3 B. & A. 689	443
Goodwin v. Cheveley, 4 H. & N. 631	238
Goodwin v. Longhurst, Cro. Eliz. 535	65, 66
Gordon v. Trevelyan, 1 Price, 64	106
Gore v. Gofton, 1 Str. 643	294
Gore v. Lloyd, 12 M. & W. 463 ; 13 L. J. Ex. 366	79, 192
Gore v. Wright, 8 A. & E. 118 ; 2 Jur. 840	460
Gorely, <i>Ex parte</i> , 4 D. J. & S. 477 ; 34 L. J. Bktey. 1 ; 13 W. R. 60... ..	360
Gorges v. Stanfeld, Cro. Eliz. 593	326
Goring v. Goring, 3 Swanst. 661	326
Gorton v. Falkner, 4 T. R. 565	230, 240
Gorton v. Gregory, 3 B. & S. 90 ; 31 L. J. Q. B. 302 ; 6 L. T. 656 ; 10 W. R. 713	407
Gosling v. Woolf, '93, 1 Q. B. 39 ; 68 L. T. 89 ; 41 W. R. 106	111
Gott v. Gandy, 2 E. & B. 845 ; 23 L. J. Q. B. 1 ; 18 Jur. 310	310
Gough v. Gough, '91, 2 Q. B. 665 ; 60 L. J. Q. B. 726 ; 65 L. T. 110 ; 39 W. R. 593	509
Gough v. Howard, Peake, Add. Cas. 197	345, 346
Gough v. Wood & Co., '94, 1 Q. B. 713 ; 63 L. J. Q. B. 564 ; 70 L. T. 297 ; 42 W. R. 469	488
Gould, <i>Ex parte</i> , 13 Q. B. D. 454 ; 51 L. T. 368	475
Gould v. Bradstock, 4 Taunt. 562	258
Gouldsworth v. Knights, 11 M. & W. 337 ; 12 L. J. Ex. 283	229
Gourlay v. Duke of Somerset, 1 V. & B. 68	386
Gowan v. Christie, L. R. 2 H. L. (Se.) 273	208
Gower v. Hunt, Barnes, 290	201
Gower v. Postmaster-General, 57 L. T. 527	406
Grace, <i>Ex parte</i> , 1 B. & P. 376	74
Grace v. Morgan, 2 Bing. N. C. 534	261
Graham v. Allsopp, 3 Ex. 186 ; 18 L. J. Ex. 85	206, 207
Graham v. Tate, 1 M. & S. 609	200, 201, 363
Graham v. Wade, 16 East, 29	366
Graham v. Whichelo, 1 Cr. & M. 188	457
Grand Canal Co. v. M'Namee, 29 L. R. Ir. 131	327, 333

	PAGE
Granger v. Collins, 6 M. & W. 458	345, 369, 371
Grant v. Ellis, 9 M. & W. 113	253, 307, 519
Gravenor v. Woodhouse, 1 Bing. 38 ; 2 <i>Ibid.</i> 71	78
Graves v. Weld, 5 B. & Ad. 105 ; 2 L. J. K. B. 176	497
Gray v. Bompas, 11 C. B. N. S. 520 ; 5 L. T. 841	448
Gray v. Stait, 11 Q. B. D. 668 ; 52 L. J. Q. B. 412 ; 49 L. T. 288 ; 31 W. R. 662	247
Great Western Ry. Co. v. Rous, L. R. 4 H. L. 650	208
Great Western Ry. v. Smith, 45 L. J. Ch. 235 ; 34 L. T. 267 ; 24 W. R. 443	2
Great Western Ry. v. Smith, 2 C. D. 235 ; 3 App. Cas. 165	461, 464
Green's Case, Cro. Eliz. 3	468, 469, 470
Green v. Austin, 3 Camp. 260	294
Green v. Eales, 2 Q. B. 225 ; 11 L. J. Q. B. 63 ; 6 Jur. 436	320, 323
Green v. James, 6 M. & W. 656	417
Green v. Kopke, 18 C. B. 549	72
Green v. Listowell, 2 Ir. L. R. 384	420
Green v. Low, 22 Beav. 625 ; 2 Jur. N. S. 848	161
Green v. Marsh, '92, 2 Q. B. 330 ; 61 L. J. Q. B. 442 ; 66 L. T. 480 ; 40 W. R. 449	84
Green v. Symons, 13 T. L. R. 301	124, 331
Greenaway v. Adams, 12 Ves. 395	385
Greenaway v. Hart, 14 C. B. 340 ; 23 L. J. C. P. 115 ; 18 Jur. 449	416
Greenfield v. Hanson, 2 T. L. R. 876	473
Greenslade v. Tapscott, 1 C. M. & R. 55	199, 346, 385
Greenville Estate, <i>Re</i> , 11 L. R. Ir. 138	4
Greenwell v. Low Beechburn Coal Co., '97, 2 Q. B. 165 ; 66 L. J. Q. B. 643 ; 76 L. T. 759	132
Greenwood v. Bairstow, 5 L. J. Ch. 179	415
Greenwood v. Sutcliffe, '92, 1 Ch. 1 ; 61 L. J. Ch. 59 ; 65 L. T. 797 ; 40 W. R. 214	274
Greenwood v. Tyber, Cro. Jac. 563	20, 144
Gregg v. Coates, 23 Beav. 33 ; 2 Jur. N. S. 964	313
Gregory v. Doidge, 3 Bing. 474	78, 216
Gregory v. Mighell, 18 Ves. 328	110
Gregory v. Wilson, 9 Hare, 683 ; 16 Jur. 304	476, 477
Grescott v. Green, 1 Salk. 199	401
Gresham House Estate Co. v. Rossa Gold Mining Co., '70, W. N. p. 119	446
Gresham Life Assurance Society v. Ranger, 15 T. L. R. 454 ; 43 Sol. Journ. 624	337
Gretton v. Diggles, 4 Taunt. 766	403
Gretton v. Mees, 7 C. D. 839 ; 38 L. T. 506 ; 26 W. R. 607	306
Grey v. Cuthbertson, 2 Chit. 482	406
Grey v. Friar, 5 Ex. 584 ; 4 H. L. C. 565 ; 18 Jur. 1036	99, 156
Grey de Wilton (Lord) v. Saxon, 6 Ves. 106	350
Griffin v. Scott, 2 Ld. Raym. 1424	280
Griffin v. Stanhope, Cro. Jac. 454	180
Griffin v. Tonkins, 42 L. T. 359 ; 44 J. P. 457	469, 471
Griffinhoofe v. Daubuz, 4 E. & B. 230 ; 5 E. & B. 746 ; 25 L. J. Q. B. 237	204
Griffith, <i>Re</i> , 66 L. J. Q. B. 763	299
Griffith v. Hodges, 1 C. & P. 419	210
Griffiths, <i>Re</i> , 29 C. D. 248 ; 54 L. J. Ch. 742 ; 53 L. T. 262 ; 33 W. R. 728	9
Griffiths and Morris, <i>Re</i> , '95, 1 Q. B. 866 ; 64 L. J. Q. B. 386 ; 72 L. T. 290 ; 43 W. R. 652	508, 509
Griffiths v. Penson, 8 L. T. 84 ; 9 Jur. N. S. 385 ; 11 W. R. 313	128
Griffiths v. Puleston, 13 M. & W. 358 ; 14 L. J. Ex. 33	500
Griffiths v. Rigby, 1 H. & N. 237 ; 25 L. J. Ex. 284	341
Griffiths v. Tombs, 7 C. & P. 810	499
Grimman v. Legge, 8 B. & C. 324	213, 456
Grimwood v. Moss, L. R. 7 C. P. 360 ; 41 L. J. C. P. 239 ; 27 L. T. 268 ; 20 W. R. 972	251, 467, 470

	PAGE
Grissell v. Robinson, 3 Scott, 329; 3 Bing. N. C. 10	183
Groom v. Black, 2 M. & Gr. 567; 10 L. J. C. P. 105	411
Groombridge v. Fletcher, 2 Dowl. 353	295
Grosvenor v. Hampstead Junction Ry. Co., 1 De G. & J. 446 ..	130
Grosvenor v. Skerratt, 28 Beav. 659	74
Grosvenor Hotel Co. v. Hamilton, '94, 2 Q. B. 836; 63 L. J. Q. B. 661; 71 L. T. 362; 42 W. R. 626	371, 377
Grove, <i>Ex parte</i> , 1 Atk. 104	298, 301
Grumbrell v. Roper, 3 B. & A. 711	28
Grute v. Loeroff, Cro. Eliz. 287	21
Grymes v. Boweren, 6 Bing. 437; 8 L. J. (O. S.) C. P. 140	491
Grymes v. Peacock, 1 Bulstr. 17	133
Gudgen v. Besset, 6 E. & B. 986; 26 L. J. Q. B. 36; 3 Jur. N. S. 212	178
Gulliver v. Burr, 1 W. Bl. 596	435
Gunter v. Halsey, 2 Amb. 586	109
Gutteridge v. Munyard, 7 C. & P. 129; 1 Moo. & R. 334	312, 336
Guy v. West, cited 2 Selw. N. P. 1244	354
William v. Barker, 1 Price, 274	293
Gwillim v. Stone, 3 Taunt. 433	111
Gwinell v. Eamer, L. R. 10 C. P. 658; 32 L. T. 835	311
Gwinnet v. Phillips, 3 T. R. 643	246, 271
Gwynne v. Mainstone, 3 C. & P. 302	143
Haberdashers' Co. v. Isaac, 3 Jur. N. S. 611	385
Hackett v. Macnamara, Lloyd & G. temp. Plunkett, 283... ..	60
Haddon v. Arrowsmith, Cro. Eliz. 461	65
Haig v. Homan, 4 Bli. N. S. 380	403
Haigh v. Waterman, 16 L. T. 375	327
Haines v. Burnett, 27 Beav. 500; 29 L. J. Ch. 289; 5 Jur. N. S. 1279; 1 L. T. 18... ..	150, 164
Haines v. Welch, L. R. 4 C. P. 91; 38 L. J. C. P. 118; 19 L. T. 422; 17 W. R. 163	497, 498
Haldane v. Johnson, 8 Ex. 689; 22 L. J. Ex. 264; 17 Jur. 937	194
Haldane v. Newcomb, 9 L. T. 420; 12 W. R. 135	313
Hale, <i>Ex parte</i> , 1 C. D. 285; 45 L. J. Bk. 21; 33 L. T. 706; 24 W. R. 300	301
Hall, <i>Ex parte</i> , 10 C. D. 615; 48 L. J. Bk. 79; 40 L. T. 179; 27 W. R. 385	197
Hall v. Ball, 3 M. & Gr. 242; 10 L. J. C. P. 285	183
Hall v. Burgess, 5 B. & C. 332; 4 L. J. (O. S.) K. B. 172	210, 306
Hall v. Butler, 10 A. & E. 204	78
Hall v. Chandless, 4 Bing. 123	180
Hall v. City of London Brewery Co., 2 B. & S. 737; 31 L. J. Q. B. 257; 9 Jur. N. S. 18	152, 369
Hall v. Combes, Cro. Eliz. 368	128
Hall v. Comfort, 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48	524
Hall v. Denbigh, Cro. Eliz. 773	126
Hall v. Ewin, 37 C. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84	408
Hall v. Lund, 1 H. & C. 676; 32 L. J. Ex. 113; 9 Jur. N. S. 205; 11 W. R. 271... ..	122, 136
Hall v. Sebright, 1 Mod. 14	125
Hallen v. Runder, 1 C. M. & R. 266	494
Hallett to Martin, 24 C. D. 624; 52 L. J. Ch. 804; 48 L. T. 894	53, 58
Halliday's Settled Estate, <i>Re</i> , 12 Eq. 199	19
Hallifax v. Chambers, 4 M. & W. 662	345
Hamer v. Sharp, 19 Eq. 108	71
Hamerton v. Stead, 3 B. & C. 478; 3 L. J. (O. S.) K. B. 33	91, 457, 459
Hamilton v. Clanricarde, 1 Bro. P. C. 341	70
Hamilton v. Graham, L. R. H. L. 2 Sc. 166	140
Hamilton v. Vaughan-Sherrin, &c., Co., 1894, 3 Ch. 589; 63 L. J. Ch. 795; 71 L. T. 325; 43 W. R. 126	11

Hammerton v. Honey, 24 W. R. 603	...	...	...	...	...	346
Hammond v. Bussey, 20 Q. B. D. 79; 57 L. J. Q. B. 58	...	...	...	...	...	389
Hammond v. Mather, 3 F. & F. 151	...	...	...	...	...	467
Hampshire v. Wickens, 7 C. D. 555; 47 L. J. Ch. 243; 38 L. T. 408;	...	...	...	...	...	...
26 W. R. 491	...	...	...	...	150, 151, 152, 153, 164	...
Hanbury v. Cundy, 58 L. T. 155	...	...	...	...	...	200, 340
Hancock v. Austin, 14 C. B. N. S. 634; 32 L. J. C. P. 252; 10 Jur.	...	...	...	...	...	...
N. S. 77; 8 L. T. 429; 11 W. R. 833	...	...	...	...	84, 86, 190, 257, 258	...
Hancock v. Caffyn, 8 Bing. 358	...	...	...	...	...	80, 81, 370
Hand v. Hall, 2 Ex. D. 355; 46 L. J. Ex. 603; 25 W. R. 734	...	...	...	...	...	119
Handcock v. Foulkes, 9 M. & W. 431; 11 L. J. Ex. 381	...	...	...	...	...	291
Hammer v. Clifton, '94, 1 Q. B. 238; 42 W. R. 287	...	...	...	...	...	523
Hammer v. King, 57 L. T. 367	...	...	...	...	...	290
Hanslip v. Padwick, 5 Ex. 615; 19 L. J. Ex. 372	...	...	...	...	...	113
Hanson v. Boothman, 13 East, 22	...	...	...	...	...	342
Harbin v. Barton, Moore, 395	...	...	...	...	...	21
Harbin v. Chard, Poph. 96	...	...	...	...	...	21
Harcourt v. Wyman, 3 Ex. 817; 18 L. J. Ex. 453	...	...	...	...	...	20, 516
Harding v. Crethorn, 1 Esp. 57	...	...	...	...	...	459, 512
Harding v. Hall, 14 L. T. 410; 14 W. R. 646	...	...	...	...	...	282
Harding v. Preece, 9 Q. B. D. 281; 51 L. J. Q. B. 515; 47 L. T. 100;	...	...	...	...	...	...
31 W. R. 42	...	...	...	...	...	424
Harding v. Wilson, 2 B. & C. 96	...	...	...	...	...	133, 136
Hardwick v. Hardwick, 16 Eq. 168; 42 L. J. Ch. 636; 21 W. R. 719	...	...	...	...	...	128
Hardy v. Fothergill, 13 App. Cas. 351; 58 L. J. Q. B. 44; 59 L. T. 273;	...	...	...	...	...	...
37 W. R. 177	...	...	...	...	...	305, 412
Hardy v. Martin, 1 Cox, 26	...	...	...	...	...	199
Hare v. Burges, 4 K. & J. 45; 27 L. J. Ch. 86	...	...	...	...	...	163
Hare v. Elms, '93, 1 Q. B. 604; 62 L. J. Q. B. 187; 68 L. T. 223;	...	...	...	...	...	...
41 W. R. 297	...	...	...	...	...	476
Hare v. Groves, 3 Anst. 687	...	...	...	...	...	149, 207
Hare v. Horton, 5 B. & Ad. 715	...	...	...	...	...	136
Hargrave's Case, 5 Rep. 31 a	...	...	...	...	...	420
Hargrave v. Shewin, 6 B. & C. 34	...	...	...	...	...	146
Harley v. King, 2 Cr. M. & R. 18	...	...	...	...	...	411
Harnann v. Powell, 60 L. J. Q. B. 628; 65 L. T. 255	...	...	...	...	...	339
Harmer v. Bean, 3 C. & K. 307	...	...	...	...	...	186, 416
Harnett v. Maitland, 16 M. & W. 257	...	...	...	...	...	328
Harnett v. Yeilding, 2 Sch. & Lef. 549	...	...	...	...	...	55
Harper v. Taswell, 6 C. & P. 166	...	...	...	...	...	276
Harries v. Bryant, 4 Russ. 89	...	...	...	...	...	163
Harrington v. Wise, Cro. Eliz. 486; 2 Rol. Abr. 450	...	...	...	...	80, 146, 147, 463	...
Harris, <i>Ec parte</i> , 16 Q. B. D. 130; 55 L. J. M. C. 24; 53 L. T. 655;	...	...	...	...	...	...
34 W. R. 132	...	...	...	...	...	243
Harris v. Booker, 4 Bing. 96	...	...	...	...	...	306
Harris v. Evans, 1 Wils. 262; Amb. 329	...	...	...	...	...	144
Harris v. James, 45 L. J. Q. B. 545; 35 L. T. 240	...	...	...	...	...	311
Harris v. Jones, 1 Moo. & R. 173	...	...	...	...	...	311, 312
Harris v. Morrice, 10 M. & W. 260; 12 L. J. Ex. 43	...	...	...	...	...	2
Harris v. Ryding, 5 M. & W. 60	...	...	...	...	...	140
Harris v. Shipway, Bull. N. P. 182	...	...	...	...	...	215
Harris v. Thirkell, 20 L. T. O. S. 98	...	...	...	...	...	245
Harrison, <i>Ec parte</i> , 13 Q. B. D. 753; 53 L. J. Ch. 977; 51 L. T. 878	...	...	...	...	...	299, 301
Harrison v. Barnby, 5 T. R. 246	...	...	...	...	...	197, 229
Harrison v. Barry, 7 Price, 690	...	...	...	...	222, 280, 294	...
Harrison v. Blackburn, 17 C. B. N. S. 678; 34 L. J. C. P. 109	...	...	...	...	...	187, 403
Harrison v. Good, 11 Eq. 338; 40 L. J. Ch. 294; 24 L. T. 263;	...	...	...	...	...	...
19 W. R. 346	...	...	...	...	...	337
Harrison v. Malet, 3 T. L. R. 58	...	...	...	...	...	332
Harrison, Ainslie & Co. v. Corporation of Barrow-in-Furness, 63 L. T.	...	...	...	...	...	...
834; 39 W. R. 250	...	...	...	...	...	395

	PAGE
Harrison, Ainslie & Co. v. Muncaster, '91, 2 Q. B. 680 ; 61 L. J. Q. B. 102 ; 65 L. T. 481 ; 40 W. R. 102	373, 374
Harrison v. North, 1 Cas. in Chan. 83	207
Harrison v. Wardle, 5 B. & Ad. 146	286
Harrow School v. Alderton, 2 B. & P. 86	329
Harslet v. Butcher, Cro. Jac. 644	317
Hart v. Hart, 18 C. D. 670	151
Hart v. Leach, 1 M. & W. 560	282
Hart v. Windsor, 12 M. & W. 68 ; 13 L. J. Ex. 129 ; 8 Jur. 150	208, 331, 332
Hartcup & Co. v. Bell, C. & E. 19	68, 214
Hartley v. Hudson, 4 C. P. D. 367 ; 48 L. J. C. P. 751	368
Hartley v. Maddocks, '99, 2 Ch. 199 ; 68 L. J. Ch. 496 ; 80 L. T. 755 ; 47 W. R. 573	212
Hartshorne v. Watson, 4 Bing. N. C. 178 ; 2 Jur. 155	465
Harvey v. Barnard's Inn, 50 L. J. Ch. 750 ; 45 L. T. 280 ; 29 W. R. 922	103
Harvey v. Brydges, 14 M. & W. 437	519
Harvey v. Copeland, 30 L. R. Ir. 412	436, 438
Harvey v. Grabham, 5 A. & E. 61	104
Harvey v. Harvey, 2 Str. 1141	490
Harvey v. Oswald, Cro. Eliz. 553, 572	468
Harvey v. Pocock, 11 M. & W. 740 ; 12 L. J. Ex. 434	289
Haseler v. Lemoyne, 5 C. B. N. S. 530 ; 28 L. J. C. P. 103 ; 4 Jur. N. S. 1279	255, 256
Hassard v. Clark, 13 L. R. Ir. 391	381
Hasties and Crawford, <i>Re</i> , 36 W. R. 572	185
Hastings (Lord) v. North Eastern Ry. Co., '98, 2 Ch. 674 ; 78 L. T. 812 ; 47 W. R. 59 ; affirmed '99, 1 Ch. 656 ; 68 L. J. Ch. 315 ; 80 L. T. 217	189, 414, 415
Hastings (Lord) v. Saddler, 79 L. T. 355	513
Hastings (Mayor of) v. Thorley, 8 C. & P. 573	274
Hatch v. Hale, 15 Q. B. 10 ; 19 L. J. Q. B. 289 ; 14 Jur. 459	257, 272
Hatten v. Russell, 38 C. D. 334 ; 57 L. J. Ch. 425 ; 58 L. T. 271 ; 36 W. R. 317	46
Havens v. Middleton, 10 Hare, 641 ; 22 L. J. Ch. 746 ; 17 Jur. 271	359
Hawkes v. Orton, 5 A. & E. 367	375
Hawkesworth v. Chaffey, 55 L. J. Ch. 335 ; 54 L. T. 72	103
Hawkins v. Carbines, 27 L. J. Ex. 44	136
Hawkins v. Rutt, Peake, N. P. C. 186	215
Hawkins v. Sherman, 3 C. & P. 459	401, 412
Hawkins v. Walrond, 1 C. P. D. 280 ; 45 L. J. C. P. 772 ; 35 L. T. 210 ; 24 W. R. 824	277, 278, 352
Hawkins v. Warre, 3 B. & C. 690	117
Hawkins v. Williams, 10 W. R. 692	419
Hawksland v. Gatchel, Cro. Eliz. 835	178
Hawtry v. Butlin, L. R. 8 Q. B. 290 ; 42 L. J. Q. B. 163 ; 28 L. T. 532 ; 21 W. R. 633	488
Hayes v. Bickerstaff, Vaughan, 118	371
Hayling v. Okey, 8 Ex. 531	498
Hayne v. Cummings, 16 C. B. N. S. 421 ; 10 Jur. N. S. 773 ; 10 L. T. 341	119, 148, 164
Haynes v. King, '93, 3 Ch. 439 ; 63 L. J. Ch. 21 ; 69 L. T. 855 ; 42 W. R. 56	136
Haytor Granite Co., <i>Re</i> , 1 Ch. 77 ; 35 L. J. Ch. 154 ; 12 Jur. N. S. 1 ; 13 L. T. 515 ; 14 W. R. 186	304
Hayward v. Haswell, 6 A. & E. 265 ; 1 Jur. 54	80
Hayward v. Parke, 16 C. B. 295 ; 24 L. J. C. P. 217 ; 1 Jur. N. S. 781	388
Haywood v. Brunswick Building Society, 8 Q. B. D. 403 ; 51 L. J. Q. B. 73 ; 45 L. T. 699 ; 30 W. R. 299	404
Haywood v. Cope, 25 Beav. 140 ; 27 L. J. Ch. 468	107, 127, 208
Haywood v. Silber, 30 C. D. 404 ; 54 L. T. 108 ; 34 W. R. 114	386
Hazeldine v. Heaton, C. & E. 40	222, 387

	PAGE
Hazle's Settled Estate, <i>Re</i> , 29 C. D. 78; 54 L. J. Ch. 628; 52 L. T. 947; 33 W. R. 759	49
Heap v. Barton, 12 C. B. 274; 21 L. J. C. P. 153; 16 Jur. 891	492, 494
Heap v. Hartley, 42 C. D. 461; 58 L. J. Ch. 790; 61 L. T. 538; 38 W. R. 136	86
Heard v. Pilley, 4 Ch. 548; 38 L. J. Ch. 718; 21 L. T. 68; 17 W. R. 750	71, 108
Hearn v. Allen, Cro. Cas. 57	133
Hearn v. Tomlin, Peake, N. P. C. 192	91
Heawood v. Bone, 13 Q. B. D. 179; 51 L. T. 125; 32 W. R. 752	242
Heckman v. Isaac, 6 L. T. 383	358
Hefford v. Alger, 1 Taunt. 218	286
Hegan v. Johnson, 2 Taunt. 148	190, 220
Hegarty v. Milne, 14 C. B. 627	117
Helier v. Casebert (<i>or</i> Casbard) 1 Lev. 127; 1 Sid. 266	146, 420, 422
Hellard v. Bewes, <i>Re</i> , '96, 2 Ch. 229	185
Hellawell v. Eastwood, 6 Ex. 295; 20 L. J. Ex. 154	230, 479, 483
Helling v. Lumley, 3 De G. & J. 493; 28 L. J. Ch. 249; 5 Jur. N. S. 301; 7 W. R. 152	115
Hemming v. Brabazon, O. Bridg. Rep. (by Bannister) 1...	24
Hemingway v. Fernandes, 13 Sim. 228	406
Henchett v. Kimpson, 2 Wils. 140	294
Henderson v. Hay, 3 Bro. C. C. 632	150, 153
Henderson v. Mears, 28 L. J. Q. B. 305; 5 Jur. N. S. 709; 7 W. R. 554	210
Henderson v. Squire, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73; 19 L. T. 501; 17 W. R. 519	512
Henderson v. Thorn, '93, 2 Q. B. 164; 62 L. J. Q. B. 586; 69 L. T. 430; 41 W. R. 509	322
Henson v. Coope, 3 Sc. N. R. 48	121
Henstead's Case, 5 Rep. 10 a...	63
Herbage Rents, Greenwich, <i>Re</i> , '96, 2 Ch. 811; 65 L. J. Ch. 871; 75 L. T. 148; 45 W. R. 74	307
Herlakenden's Case, 4 Rep. 62 a	356, 482
Herne v. Benbow, 4 Taunt. 764	328
Hersey v. Giblett, 18 Beav. 174; 23 L. J. Ch. 818	100
Hersey v. White, 9 T. L. R. 335	88
Hewitt v. Isham, 7 Ex. 77; 21 L. J. Ex. 35	139
Hewlins v. Shippam, 5 B. & C. 221	120
Hewson v. South Western Ry. Co., 8 W. R. 467	130
Hext v. Gill, 7 Ch. 699; 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957	131, 132, 140
Hey v. Moorhouse, 6 Bing. N. C. 52	512
Hey v. Wyche, 12 L. J. Q. B. 83; 6 Jur. 559	358
Heys v. Tindall, 1 B. & S. 296; 30 L. J. Q. B. 362; 4 L. T. 403; 9 W. R. 664	72
Hicks v. Cooke, 4 Dow, 16	73
Hickley and Steward, <i>Re</i> , 54 L. J. Ch. 608; 52 L. T. 89; 33 W. R. 320	185
Hickman v. Isaacs, 4 L. T. N. S. 285	336
Hickman v. Mechin, 4 H. & N. 716; 28 L. J. Ex. 310	197
Hicks v. Downing, 1 Ld. Raym. 99	309, 386
Higginshaw Mills Co., <i>Re</i> , '96, 2 Ch. 544; 65 L. J. Ch. 771; 75 L. T. 5; 45 W. R. 56	302, 303, 304
Higgs v. Scott, 7 C. B. 63	196
Highgate School v. Sewell, '93, 2 Q. B. 254; 62 L. J. Q. B. 476; 69 L. T. 118; 41 W. R. 637	473
Highgate School v. Sewell, '94, 2 Q. B. 906; 63 L. J. Q. B. 820; 71 L. T. 88	475
Hillary v. Gay, 6 C. & P. 284	518, 519
Hill v. Barclay, 18 Ves. 56	476, 477
Hill v. Barclay, 16 Ves. 402	322
Hill (Viscount) v. Bullock, '97, 2 Ch. 482; 66 L. J. Ch. 705; 77 L. T. 240; 46 W. R. 84	482

	PAGE
Hill v. East and West India Dock Co., 9 App. Cas. 448 ; 53 L. J. Ch. 842 ; 51 L. T. 163 ; 32 W. R. 925	424, 425
Hill v. Edward, C. & E. 481	369
Hill v. Grange, Plowd. 164	147, 193
Hill v. Hickin, '97, 2 Ch. 579	63
Hill v. Kempshall, 7 C. B. 975	465
Hill v. Patton, 8 East, 373	180
Hill v. Ramm, 5 M. & Gr. 789	170
Hill v. Saunders, 2 Bing. 112 ; 4 B. & C. 529 ; 4 L. J. (O. S.) K. B. 2... ..	77, 211, 228
Hills v. Rowland, 4 D. M. & G. 430 ; 22 L. J. Ch. 964	348
Hills v. Street, 5 Bing. 37	280
Hilton v. Goodhind, 2 C. & P. 591	198
Hilton v. Green, 2 F. & F. 821	382
Hilton v. Tipper, 18 L. T. 626 ; 16 W. R. 888	396
Hinchcliffe v. Kinnoul, 5 Bing. N. C. 1	133
Hinde v. Gray, 1 M. & Gr. 195 ; 9 L. J. C. P. 253 ; 4 Jur. 392	159, 333
Hindle v. Blades, 5 Taunt. 225	287
Hindle v. Pollitt, 6 M. & W. 529	350
Hindley v. Emery, 1 Eq. 52 ; 35 L. J. Ch. 6 ; 11 Jur. N. S. 874 ; 13 L. T. 272 ; 14 W. R. 25	329
Hirst v. Horn, 6 M. & W. 393	515
Hitchcock v. Coker, 6 A. & E. 438	333
Hitchings v. Thompson, 5 Ex. 50 ; 19 L. J. Ex. 146	216
Hoare v. Chambers, 11 T. L. R. 185	111, 369
Hobbs & Co. v. Hudson, 25 Q. B. D. 232 ; 59 L. J. Q. B. 562 ; 63 L. T. 215 ; 38 W. R. 682	249
Hobson v. Gorringe, '97, 1 Ch. 182 ; 66 L. J. Ch. 114 ; 75 L. T. 610 ; 45 W. R. 356	480, 488
Hobson v. Tulloch, '98, 1 Ch. 424 ; 67 L. J. Ch. 502	338
Hoby v. Roebuck, 7 Taunt. 157	191
Hodges v. Lawrance, 18 J. P. 347	129, 244, 458
Hodges v. Newcomen, cited 5 Rep. 15	25
Hodgkinson v. Crowe, 19 Eq. 591 ; 10 Ch. 622 ; 44 L. J. Ch. 238, 680 ; 33 L. T. 122, 388 ; 23 W. R. 885	150, 151, 152, 153, 154, 163, 164
Hodgson v. East India Co., 8 T. R. 278	211
Hodgson v. Gascoigne, 5 B. & A. 88	293
Hodgson v. Hooper, 3 E. & E. 149 ; 29 L. J. Q. B. 222 ; 6 Jur. N. S. 911 ; 3 L. T. 149 ; 8 W. R. 637	520
Hodson v. Henland, '96, 2 Ch. 428 ; 65 L. J. Ch. 754 ; 74 L. T. 811 ; 44 W. R. 684	111
Hodson v. Sharpe, 10 East, 350	181
Hodson (or Hudson) v. Walker, L. R. 7 Ex. 55 ; 41 L. J. Ex. 51 ; 25 L. T. 937 ; 20 W. R. 489	526
Hogarth v. Jennings, '92, 1 Q. B. 907 ; 61 L. J. Q. B. 601 ; 66 L. T. 821 ; 40 W. R. 517	254
Hogan v. Hand, 14 Moo. P. C. 310 ; 4 L. T. 565 ; 9 W. R. 673	432
Hogg v. Brooks, 15 Q. B. D. 256	446
Hogg v. Crosse, Cro. Eliz. 254	144
Hogg v. Norris, 2 F. & F. 246	123
Holcombe v. Hewson, 2 Camp. 391	340
Holder v. Coates, M. & M. 112	355
Holder v. Soulby, 8 C. B. N. S. 254 ; 29 L. J. C. P. 246	88
Holder v. Taylor, Hob. 12	375
Holding v. Pigott, 7 Bing. 465	500
Hole v. Chard Union, '94, 1 Ch. 293 ; 63 L. J. Ch. 469 ; 70 L. T. 52	377
Holford v. Acton District Council, '98, 2 Ch. 240 ; 78 L. T. 829	408
Holford v. Hatch, 1 Dougl. 183	387
Holgate v. Kay, 1 C. & K. 341	212
Holland v. Bird, 10 Bing. 15	257, 272

Holland <i>v.</i> Cole, 1 H. & C. 67 ; 31 L. J. Ex. 481 ; 8 Jur. N. S. 1066 ; 6 L. T. 503 ; 10 W. R. 563	392
Holland <i>v.</i> Eyre, 2 S. & S. 194	102
Holland <i>v.</i> Hodgson, L. R. 7 C. P. 328 ; 41 L. J. C. P. 146 ; 26 L. T. 709 ; 20 W. R. 990	230, 479, 481, 482, 483, 484, 487
Holland <i>v.</i> Kensington Vestry, L. R. 2 C. P. 565 ; 36 L. J. M. C. 105 ; 17 L. T. 73 ; 15 W. R. 1045	81
Holland <i>v.</i> Palser, 2 Stark. 161	146
Hollis <i>v.</i> Carr, 2 Mod. 87	149
Holme <i>v.</i> Brunskill, 3 Q. B. D. 495 ; 47 L. J. Q. B. 610 ; 38 L. T. 838	2, 378, 456
Holmes <i>v.</i> Blogg, 8 Taunt. 35, 508	10, 11
Holmes and Formby, <i>Re</i> , '95, 1 Q. B. 174 ; 64 L. J. Q. B. 391 ; 71 L. T. 842 ; 43 W. R. 205	507
Holt & Co. <i>v.</i> Collyer, 16 C. D. 718 ; 50 L. J. Ch. 311 ; 44 L. T. 214 ; 29 W. R. 502	335
Holtzapffel <i>v.</i> Baker, 18 Ves. 115	207
Homan <i>v.</i> Moore, 4 Price, 5	76
Home and Colonial Stores <i>v.</i> Todd, 63 L. T. 829	367
Homes <i>v.</i> Pearce, 1 F. & F. 283	176
Honeycomb <i>v.</i> Waldron, 2 Str. 1064	181
Honeyman <i>v.</i> Marryatt, 6 H. L. C. 112 ; 26 L. J. Ch. 619 ; 4 Jur. N. S. 17 ; affirming 21 Beav. 14 ; 3 W. R. 502	103
Honywood <i>v.</i> Honywood, 18 Eq. 306	324, 355
Hood (Lord) <i>v.</i> Kendall, 17 C. B. 260	347, 356
Hooper, <i>Ex parte</i> , 19 Ves. 477	109
Hooper <i>v.</i> Brodriek, 11 Sim. 47	339
Hooper <i>v.</i> Clark, L. R. 2 Q. B. 200 ; 36 L. J. Q. B. 79 ; 16 L. T. 152 ; 15 W. R. 347	85, 404, 415, 406
Hopcraft <i>v.</i> Keys, 9 Bing. 613	77, 220
Hope <i>v.</i> Atkins, 1 Price, 143	121
Hope <i>v.</i> Hope, 1892, 2 Ch. 336 ; 61 L. J. Ch. 441 ; 66 L. T. 522 ; 40 W. R. 522	16
Hopkins <i>v.</i> Grazebrook, 6 B. & C. 31	113
Hopkins <i>v.</i> Helmore, 8 A. & E. 463 ; 2 Jur. 856	146, 191, 193
Hopkinson <i>v.</i> Lovering, 11 Q. B. D. 92 ; 52 L. J. Q. B. 391	409, 423
Hopwood <i>v.</i> Barefoot, 11 Mod. 237	364
Hopwood <i>v.</i> Whaley, 6 C. B. 744 ; 18 L. J. C. P. 43 ; 12 Jur. 1088	421
Horn <i>v.</i> Baker, 9 East, 215	480
Horn and Francis, <i>Re</i> , '96, 2 Ch. 797 ; 66 L. J. Ch. 15 ; 75 L. T. 370 ; 45 W. R. 72	185
Hornby <i>v.</i> Cardwell, 8 Q. B. D. 329 ; 51 L. J. Q. B. 89 ; 45 L. T. 781 ; 30 W. R. 263	389
Horne's Settled Estate, <i>Re</i> , 39 C. D. 84 ; 57 L. J. Ch. 790 ; 59 L. T. 580 ; 37 W. R. 69	4, 49
Horne <i>v.</i> Lewin, 1 Ld. Raym. 639	257
Horneby <i>v.</i> Clifton, Dyer, 264 a	136
Herner <i>v.</i> Graves, 7 Bing. 735	333
Hornidge <i>v.</i> Wilson, 11 A. & E. 645	421
Horsefall <i>v.</i> Davy, 1 Stark. 169	246
Horsefall <i>v.</i> Mather, Holt, N. P. 7	308
Horsefall <i>v.</i> Testar, 7 Taunt. 385	317
Horsey <i>v.</i> Graham, L. R. 5 C. P. 9 ; 39 L. J. C. P. 58 ; 21 L. T. 530 ; 18 W. R. 141	397
Horsey's Claim, <i>Re</i> , 5 Eq. 561 ; 37 L. J. Ch. 393 ; 18 L. T. 103 ; 16 W. R. 577	304
Horsey Estate, Lim. <i>v.</i> Steiger, '98, 2 Q. B. 259 ; '99, 2 Q. B. 79 ; 67 L. J. Q. B. 747 ; 68 <i>Ibid.</i> 743 ; 79 L. T. 116 ; 80 <i>Ibid.</i> 857 ; 47 W. R. 644	167, 168, 473
Horsfall <i>v.</i> Hey, 2 Ex. 778 ; 17 L. J. Ex. 266	174
Horsford <i>v.</i> Webster, 1 Cr. M. & R. 696	219, 252
Horsley <i>v.</i> Rush, cited 7 T. R. p. 209	70
Hoskins <i>v.</i> Knight, 1 M. & S. 245	293

	PAGE
Houghton's Estate, <i>Re</i> , W. N. '94, p. 20	52
Houghton v. Koenig, 18 C. B. 235 ; 25 L. J. C. P. 218	176
House and Land Investment Trust, <i>Re</i> , 42 W. R. 572	303
Houssé v. Laxton, Cro. Eliz. 890	126
Houston v. Marquis of Sligo, 55 L. T. 614... ..	137
How v. Greek, 3 H. & C. 391 ; 34 L. J. Ex. 4 ; 10 Jur. N. S. 1187 ; 11 L. T. 315 ; 13 W. R. 80	179
How v. Kennett, 3 A. & E. 659	306
Howard v. Fanshawe, '95, 2 Ch. 581 ; 64 L. J. Ch. 666 ; 73 L. T. 77 ; 43 W. R. 645	472, 476
Howard v. Lovegrove, l. R. 6 Ex. 43 ; 40 L. J. Ex. 13 ; 23 L. T. 396 ; 19 W. R. 188	412
Howard v. Maitland, 11 Q. B. D. 695 ; 53 L. J. Q. B. 42	374
Howard v. Shaw, 8 M. & W. 118	91, 92
Howard v. Wood, 2 Lev. 245	3
Howarth v. Armstrong, 13 T. L. R. 529	137
Howe v. Searrott, 4 H. & N. 723 ; 28 L. J. Ex. 325	228
Howell, <i>Re</i> , '95, 1 Q. B. 844 ; 64 L. J. Q. B. 454 ; 72 L. T. 472 ; 43 W. R. 447... ..	301
Howell v. Richards, 11 East, 633	372
Howlett v. Tarte, 10 C. B. N. S. 813 ; 31 L. J. C. P. 146 ; 9 W. R. 868	81
Howse v. Webster, Yelv. 103	420
Hudd v. Ravenor, 2 Br. & B. 662	263, 270, 284
Hudson v. Cripps, '96, 1 Ch. 265 ; 65 L. J. Ch. 328 ; 73 L. T. 741 ; 44 W. R. 200	408
Hudson v. Williams, 39 L. T. 632	316
Huffell v. Armitstead, 7 C. & P. 56... ..	435
Hugall v. McLean, 53 L. T. 94 ; 33 W. R. 588	321
Huggall v. McKean, C. & E. 391	315
Hughes, <i>Ex parte</i> , 6 Ves. 617	74
Hughes and Crowther's Case, 13 Rep. 66	99, 145
Hughes v. Overseers of Chatham, 5 M. & Gr. 54 ; 13 L. J. C. P. 44 ; 7 Jur. 1136	88
Hughes v. Clark, 10 C. B. 905 ; 15 Jur. 430	176
Hughes v. Fanagan, 30 L. R. Ir. 111	46
Hughes v. Hughes, 1 Ves. 161	226
Hughes v. Metrop. Ry. Co., 2 App. Cas. 439 ; 46 L. J. C. P. 583 ; 36 L. T. 932 ; 25 W. R. 680	317
Hughes v. Richman, Cowp. 125	348
Hughes v. Rimmer, '93, 2 Q. B. 314 ; 69 L. T. 417 ; 42 W. R. 79	205
Hughes v. Robotham, Cro. Eliz. 302	454
Hughes v. Smallwood, 25 Q. B. D. 306 ; 59 L. J. Q. B. 503 ; 63 L. T. 198	298
Huguenin v. Baseley, 14 Ves. 273 ; 1 Wh. & T. L. C. 10th ed. 247	74
Hull v. Tupper, 2 H. & C. 121	86
Humberstone v. Dubois, 10 M. & W. 765	518
Humble v. Langston, 7 M. & W. 517	410
Humfrey v. Gery, 7 C. B. 567	308
Humphery v. Conybeare, 80 L. T. 40	107
Humphreston's Case, 2 Leon. 216	7
Humphreys v. Franks, 18 C. B. 323	439
Humphreys v. Green, 10 Q. B. D. 148 ; 52 L. J. Q. B. 140 ; 48 L. T. 60	110
Humphry v. Damion, Cro. Jac. 300	217
Hungerford v. Clay, 9 Mod. 1	69
Hunt v. Allgood, 10 C. B. N. S. 253 ; 30 L. J. C. P. 313	449
Hunt v. Bishop, 8 Ex. 675 ; 22 L. J. Ex. 337	164, 319
Hunt v. Colson, 3 Moo. & Sc. 790	87
Hunt v. Cope, Cowp. 242	210
Hunt v. Remnant, 9 Ex. 635 ; 23 L. J. Ex. 135 ; 18 Jur. 335	164
Hunt v. Singleton (referred to), 3 Rep. 60 a	27, 28
Hunt v. Wimbledon Local Board, 4 C. P. D. 48 ; 48 L. J. C. P. 207 ; 40 L. T. 115 ; 27 W. R. 123	24
Hunter v. Hopetoun (Earl of), 13 L. T. 130	163

	PAGE
Hunter v. Hunt, 1 C. B. 300 ; 14 L. J. C. P. 113	390
Hunter v. Miller, 4 Macq. 560 ; 9 L. T. 159	348
Hunter v. Nockolds, 1 Mac. & G. 640 ; 19 L. J. Ch. 177	308
Huntley v. Russell, 13 Q. B. 572 ; 18 L. J. Q. B. 239	480
Huntingdon (Earl of) v. Lord Mountjoy, 4 Leon. 147	85
Hurd v. Fletcher, 1 Doug. 43	375
Hurleston v. Woodroffe, Cro. Jac. 519	133
Hurry v. Rickman, 1 Moo. & R. 126	256
Hurst v. Hurst, 4 Ex. 571 ; 19 L. J. Ex. 410	366
Hussey v. Horne-Payne, 4 App. Cas. 311 ; 48 L. J. Ch. 846 ; 41 L. T. 1 ; 27 W. R. 585	106
Hutchins v. Chambers, 1 Burr. 579	263
Hutchins v. Scott, 2 M. & W. 809	147, 180, 193, 259
Hutchinson v. Taylor, 77 L. T. Newsp. 120	209
Hutt v. Morrell, 11 Q. B. 438 ; 16 L. J. Q. B. 240 ; 12 Jur. 352	235
Hutton v. Warren, 1 M. & W. 466	97, 328, 346, 499, 500
Huxham v. Ilewellyn, 28 L. T. 577 ; 21 W. R. 570, 766	114
Hyatt v. Griffiths, 17 Q. B. 505	95, 97
Hyam v. Terry, 25 Sol. Journ. 371	113
Hyde v. Hill, 3 T. R. 377	202, 365
Hyde v. Skinner, 2 P. Wms. 196	162, 163
Hyde v. Warden, 3 Ex. D. 72 ; 47 L. J. Ex. 121 ; 37 L. T. 567 ; 26 W. R. 201	152, 154, 164, 166, 186, 388, 452
Ibbett v. De La Salle, 6 H. & N. 233 ; 30 L. J. Ex. 44... ..	256
Ibbs v. Richardson, 9 A. & E. 849 ; 3 Jur. 102	512
Iggulden v. May, 9 Ves. 325 ; 7 East, 237	146, 154, 162, 370
Imperial Loan Co. v. Stone, 1892, 1 Q. B. 599 ; 61 L. J. Q. B. 449 ; 66 L. T. 556	14
Imray v. Oakshette, '97, 2 Q. B. 218 ; 66 L. J. Q. B. 544 ; 76 L. T. 632 ; 45 W. R. 681	475
Inchiquin v. Lyons, 20 L. R. Ir. 474	448, 458
Inderwick v. Leech, C. & E. 412	323
Ingham v. Fenton, 10 T. L. R. 113	504, 507
Inkop v. Morchureh, 2 F. & F. 501	248
Inman v. Inman, 15 Eq. 260	7
Inman v. Stamp, 1 Stark. 12... ..	104
Iredale v. Kendall, 40 L. T. 362	221, 259, 268, 279
Ireland v. Bircham, 2 Bing. N. C. 90	375
Irish Land Commission v. Grant, 10 App. Cas. 14	307, 519
Isaac, <i>Re</i> , 4 My. & Cr. 11	452
Isaacs, <i>Re</i> , '94, 3 Ch. 506 ; 71 L. T. 386 ; 42 W. R. 685	160
Isherwood, <i>Ex parte</i> , 22 C. D. 384 ; 52 L. J. Ch. 370 ; 48 L. T. 398 ; 31 W. R. 442	426
Isherwood v. Oldknow, 3 M. & S. 382	54, 416
Ivay v. Hedges, 9 Q. B. D. 80	310
Ive's Case, 5 Rep. 11 a	457
Ive v. Sams, Cro. Eliz. 521	138, 457
Izard, <i>Re</i> , 23 C. D. 115 ; 48 L. T. 502	426
Izon v. Gorton, 5 Bing. N. C. 501 ; 7 Scott, 537 ; 3 Jur. 653	207
Jack v. M ^c Intyre, 12 Cl. & F. 151	127
Jackman v. Hoddesdon, Cro. Eliz. 351	65
Jackson, <i>Ex parte</i> , 14 C. D. 725 ; 43 L. T. 272 ; 29 W. R. 253... ..	300
Jackson v. Bennan, cited in Hunter's Law of Distress, 5th ed. p. 31	254
Jackson v. Cator, 5 Ves. 688... ..	139
Jackson v. Corbin, 8 M. & W. 790	111
Jackson v. Hanson, 8 M. & W. 477... ..	286
Jackson v. Neal, Cro. Eliz. 395	65
Jackson v. Northampton Tramways Co., 55 L. T. 91	465
Jackson v. Oglander, 2 H. & M. 465 ; 13 L. T. 16 ; 13 W. R. 936	106
Jackson v. Ross, '98, 2 I. R. 65	368

	PAGE
Jacob v. King, 5 Taunt. 451 ...	276, 283
Jacobs v. Seward, L. R. 5 H. L. 464; 41 L. J. C. P. 221; 27 L. T. 185...	445
Jacomb v. Harwood, 2 Ves. Sen. 265 ...	61
Jacques v. Harrison, 12 Q. B. D. 165; 53 L. J. Q. B. 137; 50 L. T. 246; 32 W. R. 470 ...	473
Jaques v. Millar, 6 C. D. 153; 47 L. J. Ch. 544; 37 L. T. 151; 25 W. R. 846 ...	107, 113
James, <i>Re</i> , 5 Eq. 334 ...	5
James, <i>Ex parte</i> , 8 Ves. 337 ...	74
James's Settled Estate, <i>Re</i> , 32 W. R. 898 ...	4
James v. Cochrane, 8 Ex. 556; 22 L. J. Ex. 201; 1 W. R. 232 ...	342
James v. Dean, 11 Ves. 383 ...	433
James v. Dean, 15 Ves. 241 ...	418
James v. Emery, 8 Taunt. 245 ...	156
James v. Jenkins, Bull. N. P. 96 b ...	51
Jarrett v. Hunter, 34 C. D. 182; 56 L. J. Ch. 141; 55 L. T. 727; 35 W. R. 132 ...	107
James v. Landon, Cro. Eliz. 36 ...	77
James v. Lichfield, 9 Eq. 51 ...	415
Jarman v. Hale, '99, 1 Q. B. 994; 68 L. J. Q. B. 681 ...	520
Jeffcock's Trusts, <i>Re</i> , 51 L. J. Ch. 507 ...	55
Jeffery v. Bastard, 4 A. & E. 823 ...	287
Jeffery v. Neale, L. R. 6 C. P. 240; 40 L. J. C. P. 191; 24 L. T. 362; 19 W. R. 700 ...	363
Jeffery v. Stephens, 8 W. R. 427; 6 Jur. N. S. 947 ...	114
Jefferys v. Fairs, 4 C. D. 448; 46 L. J. Ch. 113; 36 L. T. 10; 25 W. R. 227...	208
Jeffries v. Evans, 19 C. B. N. S. 246; 34 L. J. C. P. 261; 11 Jur. N. S. 584; 13 L. T. 72; 13 W. R. 864 ...	375, 382
Jegon v. Vivian, L. R. 1 C. P. 9; 35 L. J. C. P. 73; 12 Jur. N. S. 184; 14 W. R. 227 ...	2, 147, 342
Jenkins v. Church, Cowp. 482 ...	51
Jenkins v. Gething, 2 J. & H. 520 ...	481, 491
Jenkins v. Green (No. 1), 27 Beav. 437; 28 L. J. Ch. 817; 5 Jur. N. S. 304...	107, 137, 138
Jenkins v. Green (No. 2), 27 Beav. 440 ...	29
Jenkins v. Green (No. 3), 28 Beav. 87; 1 De G. F. & J. 454 ...	29
Jenkins v. Jackson, 40 C. D. 71; 58 L. J. Ch. 124; 60 L. T. 105; 37 W. R. 253...	373
Jenner v. Clegg, 1 Moo. & R. 213 ...	190, 220, 448
Jenner v. Yolland, 6 Price, 3 ...	240, 277
Jenney v. Brook, 6 Q. B. 323; 13 L. J. Q. B. 376; 8 Jur. 782...	138
Jennings v. Major, 8 C. & P. 61 ...	183
Jennings v. Throgmorton, Ry. & M. 251 ...	330
Jerrold v. Edwards, 92 L. T. Jo. 8 ...	524
Jersey (Earl of) v. Neath Guardians, 22 Q. B. D. 555; 58 L. J. Q. B. 573; 37 W. R. 388 ...	132
Jervis v. Tomkinson, 1 H. & N. 195; 26 L. J. Ex. 41 ...	143, 208, 342
Jesus College v. Gibbs, 1 Y. & C. Ex. 145 ...	24
Jevons v. Harridge, 1 Sandl. p. 7 ...	22
Jew v. Wood, 1 Cr. & Ph. 185; 5 Jur. 954 ...	78
Jewel's Case, 5 Rep. 3 a ...	149, 189
Jinks v. Edwards, 11 Ex. 775 ...	370
Job v. Banister, 26 L. J. Ch. 125; 3 Jur. N. S. 93; 5 W. R. 177; affirming 2 K. & J. 374 ...	163
John v. Jenkins, 1 Cr. & M. 227 ...	79, 80, 248, 249
Johns v. Ware, 1899, 1 Ch. 359; 68 L. J. Q. B. 155; 80 L. T. 112; 47 W. R. 202 ...	488
Johns v. Whitley, 1 H. & N. 669 ...	465
Johnson, <i>Re</i> , 70 L. T. 381 ...	214, 423
Johnson v. Edgware, &c., Ry. Co., 35 Beav. 480; 30 L. J. Ch. 322 ...	169

	PAGE
Johnson <i>v.</i> Faulkener, 2 Q. B. 925 ; 6 Jur. 832	234
Johnson <i>v.</i> Jones, 9 A. & E. 809	69, 197, 206
Johnson <i>v.</i> St. Peter's, Hereford, 4 A. & E. 520	96, 417
Johnson <i>v.</i> Smart, 1 Roll. Abr. 508, pl. 14... ..	66
Johnson <i>v.</i> Upham, 2 E. & E. 250 ; 28 L. J. Q. B. 252 ; 5 Jur. N. S. 681... ..	264, 273
Johnson <i>v.</i> Warwick, 17 C. B. 516 ; 25 L. J. C. P. 102... ..	418, 516
Johnson <i>v.</i> Wild, 44 C. D. 146 ; 59 L. J. Ch. 322 ; 62 L. T. 537 ; 38 W. R. 500... ..	390
Johnstone <i>v.</i> Crompton & Co., '99, 2 Ch. 190 ; 68 L. J. Ch. 559 ; 47 W. R. 604	131
Johnstone <i>v.</i> Hall, 2 K. & J. 414 ; 25 L. J. Ch. 462 ; 2 Jur. N. S. 780	334, 343
Johnstone <i>v.</i> Hudlestone, 4 B. & C. 922	437, 449, 517
Johnstone <i>v.</i> Milling, 16 Q. B. D. 460 ; 55 L. J. Q. B. 162 ; 54 L. T. 629 ; 34 W. R. 238	159
Jolliffe <i>v.</i> Blumberg, 18 W. R. 784	102
Jolly <i>v.</i> Arbuthnot, 4 De G. & J. 224 ; 28 L. J. Ch. 547 ; 5 Jur. N. S. 689... ..	75, 225
Jones, <i>Re</i> , 26 C. D. 736 ; 53 L. J. Ch. 807 ; 50 L. T. 466 ; 32 W. R. 735	48, 49
Jones <i>v.</i> Beirstein, '99, 1 Q. B. 470 ; 68 L. J. Q. B. 267 ; 80 L. T. 157 ; 47 W. R. 239 ; aff. '99, Times, Nov. 11	268
Jones <i>v.</i> Bone, 9 Eq. 674 ; 39 L. J. Ch. 405 ; 23 L. T. 304 ; 18 W. R. 489	336
Jones <i>v.</i> Bridgman, 39 L. T. 500	274, 457
Jones <i>v.</i> Carter, 15 M. & W. 718	209, 464, 467
Jones <i>v.</i> Chapman, 14 M. & W. 124	530
Jones <i>v.</i> Chappell, 20 Eq. 539 ; 44 L. J. Ch. 658... ..	327
Jones <i>v.</i> Commissioners of Inland Revenue, 1895, 1 Q. B. 484	3, 171
Jones <i>v.</i> Daniel, '94, 2 Ch. 332 ; 63 L. J. Ch. 562 ; 70 L. T. 588 ; 42 W. R. 687... ..	102
Jones <i>v.</i> Davies, 5 H. & N. 766 ; 7 <i>Ibid.</i> 507 ; 29 L. J. Ex. 374 ; 31 L. J. Ex. 116	453
Jones <i>v.</i> Foley, '91, 1 Q. B. 730 ; 60 L. J. Q. B. 464 ; 64 L. T. 538 ; 39 W. R. 510	519, 530
Jones <i>v.</i> Green, 3 Y. & J. 298	199
Jones <i>v.</i> Hamp, cited 10 M. & W. 710	278
Jones <i>v.</i> Hawkins, 3 T. L. R. 59	377
Jones <i>v.</i> Heavens, 4 C. D. 636 ; 25 W. R. 460	200
Jones <i>v.</i> Hill, 7 Taunt. 392	328
Jones <i>v.</i> Jones, 12 Ves. 186	154
Jones <i>v.</i> Jones, 3 B. & Ad. 967	226
Jones <i>v.</i> Jones, 22 Q. B. D. 425 ; 58 L. J. Q. B. 178 ; 60 L. T. 421 ; 37 W. R. 479... ..	269
Jones <i>v.</i> Marsh, 4 T. R. 464	445
Jones <i>v.</i> Mills, 10 C. B. N. S. 788 ; 31 L. J. C. P. 66 ; 8 Jur. N. S. 387... ..	435, 436, 449
Jones <i>v.</i> Nixon, 1 H. & C. 48 ; 31 L. J. Ex. 505 ; 8 Jur. N. S. 648	100, 433
Jones <i>v.</i> Owen, 18 L. J. Q. B. 8	525
Jones <i>v.</i> Phipps, 9 B. & S. 761 ; L. R. 3 Q. B. 567 ; 37 L. J. Q. B. 198 ; 18 L. T. 813 ; 16 W. R. 1044	443, 444
Jones <i>v.</i> Reynolds, 1 Q. B. 506 ; 10 L. J. Q. B. 193	79, 125
Jones <i>v.</i> Reynolds, 7 C. & P. 335 ; 4 A. & E. 805... ..	84
Jones <i>v.</i> Sawkins, 5 C. B. 142 ; 17 L. J. C. P. 92	306
Jones <i>v.</i> Shears, 4 A. & E. 832	95, 448
Jones <i>v.</i> Shears, 7 C. & P. 346	341
Jones <i>v.</i> Stone, '94, A. C. 122 ; 63 L. J. P. C. 68 ; 70 L. T. 174	78, 524
Jones <i>v.</i> Thompson, 27 L. J. Q. B. 234	198
Jones <i>v.</i> Thorne, 1 B. & C. 715	338
Jones <i>v.</i> Verney, Willes, 169... ..	53
Jones <i>v.</i> Victoria Graving Dock Co., 2 Q. B. D. 314 ; 46 L. J. Q. B. 219 ; 36 L. T. 144 ; 25 W. R. 348	108
Jones <i>v.</i> Watts, 43 C. D. 574 ; 62 L. T. 471 ; 38 W. R. 725	111

	PAGE
Jones v. Williams, 46 L. J. M. C. 270 ; 36 L. T. 559	380
Jolly v. Arbutnot, 4 De G. & J. 224	225
Jordan v. Twells, Cas. temp. Hard. 171	211
Jordan v. Wikes, Cro. Jac. 332	20
Joseph v. Lyons, 15 Q. B. D. 280 ; 54 L. J. Q. B. 1 ; 51 L. T. 740 ; 33 W. R. 145	403
Joule v. Jackson, 7 M. & W. 450	232
Jourdain v. Wilson, 4 B. & A. 266	405
Joyner v. Weeks, '91, 2 Q. B. 31 ; 60 L. J. Q. B. 510 ; 65 L. T. 16 ; 39 W. R. 583	185, 322, 323
Jump v. Payne, 68 L. J. Q. B. 607	78, 427
Jurdain v. Steere, Cro. Jac. 83	63, 64
Justice v. James, 14 T. L. R. 385 ; 15 T. L. R. 181	72
Kay v. Oxley, L. R. 10 Q. B. 360 ; 44 L. J. Q. B. 210 ; 33 L. T. 164 134, 135	134, 135
Kavanagh v. Gudge, 7 M. & Gr. 316 ; 13 L. J. C. P. 99 ; 8 Jur. 362 ...	165
Kaye v. Sutherland, 20 Q. B. D. 147 ; 57 L. J. Q. B. 68 ; 58 L. T. 56 ; 36 W. R. 508	501
Kearsley v. Oxley, 2 H. & C. 896	420
Kearsley v. Phillips, 11 Q. B. D. 621 ; 52 L. J. Q. B. 581 ; 49 L. T. 435 ; 31 W. R. 909	83
Keates v. Cadogan, 10 C. B. 591 ; 20 L. J. C. P. 76 ; 15 Jur. 428 ...	331
Keating v. Keating, Lloyd & G. temp. Sugden, 133	60
Keech v. Hall, 1 Doug. 21	68, 111
Keen v. Priest, 4 H. & N. 236 ; 28 L. J. Ex. 157 ; 32 L. T. 131 ; 7 W. R. 376	240, 283, 288
Kehoe v. Marquis of Lansdowne, '93, A. C. 451 ; 62 L. J. P. C. 97 ...	333
Keightley v. Birch, 3 Camp. 521	293
Keightley v. Watson, 3 Ex. 716	156
Keith, Prowse & Co. v. National Telephone Co., '94, 2 Ch. 147 ; 63 L. J. Ch. 373 ; 42 W. R. 380 ; 70 L. T. 276	447
Kelly v. Coote, 5 Ir. C. L. Rep. 469	10
Kelly v. Patterson, L. R. 9 C. P. 681 ; 43 L. J. C. P. 320 ; 30 L. T. 842 94, 439	94, 439
Kelly v. Rogers, '92, 1 Q. B. 910 ; 61 L. J. Q. B. 604 ; 66 L. T. 582 ; 40 W. R. 516	374
Kelly v. Webster, 12 C. B. 283 ; 21 L. J. C. P. 163 ; 16 Jur. 838 ...	397
Kemeys-Tynte, <i>Re</i> , 1892, 2 Ch. 211 ; 61 L. J. Ch. 377 ; 66 L. T. 752 ; 40 W. R. 423	47
Kemp v. Bird, 5 C. D. 974 ; 46 L. J. Ch. 828 ; 37 L. T. 53 ; 25 W. R. 838	467
Kemp v. Christmas, 79 L. T. 233	269
Kemp v. Derrett, 3 Camp. 510	436
Kemp v. Lester, '96, 2 Q. B. 162 ; 65 L. J. Q. B. 532 ; 74 L. T. 268 ; 44 W. R. 453	524
Kemp v. Sober, 1 Sim. N. S. 517 ; 20 L. J. Ch. 602 ; 15 Jur. 458 ...	334
Kempe v. Cory, 2 Ventr. 227, 283	229
Kempe v. Crews, 1 Ld. Raym. 167	238
Kendall v. Baker, 11 C. B. 842 ; 21 L. J. C. P. 110 ; 16 Jur. 479 ...	147
Kendall v. Hill, 6 Jur. N. S. 968	152
Kennan v. Murphy, 6 L. R. Ir. 108 ; 8 <i>Ibid.</i> 285	56
Kennard, <i>Ex parte</i> , 21 L. T. 684	299
Kennard v. Ashman, 10 T. L. R. 213, 447	124, 331
Kennedy v. Woods, Ir. R. 1 C. L. 76	521
Kensley v. Langham, Cas. temp. Talbot, 144	2
Kensington v. Phillips, 5 Dow, 61	106
Kensy v. Richardson, Cro. Eliz. 728	65
Kent Coast Ry. Co. v. London, Chatham and Dover Ry. Co., 3 Ch. 656 ; 19 L. T. 174 ; 16 W. R. 1027	24
Keppell v. Bailey, 2 My. & K. 517	407
Kerby v. Harding, 6 Ex. 234 ; 20 L. J. Ex. 163 ; 15 Jur. 953 ...	268, 270

Kerkin v. Kerkin, 3 E. & B. 399	...	...	...	...	...	526
Kerrison v. Smith, '97, 2 Q. B. 445 ; 66 L. J. Q. B. 762 ; 77 L. T. 344	...	...	...	...	...	87
Kerslake v. White, 2 Stark. 508	...	...	...	...	...	122, 132
Ketsey's Case, 1 Brownlow, 120	...	...	...	...	...	7, 10
Keyse v. Powell, 2 E. & B. 132 ; 22 L. J. Q. B. 305	...	...	...	...	...	186
Kidd v. Boone, 12 Eq. 89 ; 40 L. J. Ch. 531 ; 24 L. T. 356	...	...	...	...	...	215
Kidderminster (Mayor of) v. Hardwick, L. R. 9 Ex. 13	...	...	...	...	...	24
Kilmorey's Settled Estate, <i>Re</i> Earl of, 26 W. R. 514	...	...	...	...	...	19
Kimpton v. Eve, 2 Ves. & B. 349	...	...	...	...	...	329
Kind v. Ammery, Hutton, 23	...	...	...	...	...	252
Kine v. Balfe, 2 Ball & B. 343	...	...	...	...	...	110
King's Leasehold Estates, <i>Re</i> , 16 Eq. 521 ; 29 L. T. 288 ; 21 W. R. 881	...	...	...	...	...	56, 100, 145
King v. England, 4 B. & S. 782 ; 33 L. J. Q. B. 145 ; 10 Jur. N. S. 634 ; 9 L. T. 645 ; 12 W. R. 308	...	...	...	...	...	279
King v. Eversfield, '97, 2 Q. B. 475 ; 66 L. J. Q. B. 809 ; 77 L. T. 195 ; 46 W. R. 51	...	...	...	...	...	433, 502, 512
King v. Malcott, 9 Hare, 692	...	...	...	...	...	422
King v. Rymill, 78 L. T. 696	...	...	...	...	...	402
Kingdon v. Nottle, 1 M. & S. 355	...	...	...	...	...	418
Kingsbury v. Collins, 4 Bing. 202	...	...	...	...	...	497
Kingsmill v. Millard, 11 Ex. 313	...	...	...	...	...	129, 513, 514
Kinlyside v. Thornton, 2 W. Bl. 1111	...	...	...	...	...	329
Kinsella v. Hamilton, 26 L. R. tr. 671	...	...	...	...	...	255
Kinsman v. Jackson, 42 L. T. 80, 558 ; 28 W. R. 601	...	...	...	...	...	343
Kintrea v. Perston, 1 H. & N. 357 ; 25 L. J. Ex. 287	...	...	...	...	...	398
Kirby v. Biffen, 8 Q. B. D. 201 ; 51 L. J. Q. B. 183 ; 46 L. T. 253 ; 30 W. R. 823	...	...	...	...	...	242
Kirby v. Harrogate School Board, '96, 1 Ch. 437 ; 65 L. J. Ch. 376 ; 74 L. T. 62	...	...	...	...	...	415
Kirkheaton Local Board v. Ainley, Sons & Co., '92, 2 Q. B. 274 ; 61 L. J. Q. B. 812 ; 67 L. T. 209 ; 41 W. R. 99	...	...	...	...	...	509
Kirkland v. Briancourt, 6 T. L. R. 441	...	...	...	...	...	251, 470
Kirtland v. Pounsett, 2 Taunt. 145	...	...	...	...	...	91
Kirton v. Elliott, 2 Bulstr. 69 ; 1 Brownlow, 120 ; 1 Roll. Abr. 731	...	...	...	...	...	10
Knibbs v. Hall, 1 Esp. 84	...	...	...	...	...	263
Knight, <i>Re</i> , 1 Ex. 802	...	...	...	...	...	363
Knight's Case, 5 Rep. 54 b	...	...	...	...	...	146
Knight v. Bennett, 3 Bing. 361	...	...	...	...	...	94, 220
Knight v. Bennett, 3 Bing. 364	...	...	...	...	...	250
Knight v. Clarke, 15 Q. B. D. 294 ; 54 L. J. Q. B. 509	...	...	...	...	...	525
Knight v. Cox, 18 C. B. 645 ; 25 L. J. C. P. 314	...	...	...	...	...	78
Knight v. Egerton, 7 Ex. 407	...	...	...	...	...	290, 291
Knight v. Hickman, 29 Sol. Journ. 386	...	...	...	...	...	77
Knight v. Mory, Cro. Eliz. 60	...	...	...	...	...	393
Knight v. Simmonds, '96, 2 Ch. 294 ; 65 L. J. Ch. 583 ; 74 L. T. 563 ; 44 W. R. 580	...	...	...	...	...	344
Knill v. Prowse, 33 W. R. 163	...	...	...	...	...	198
Knotts v. Curtis, 5 C. & P. 322	...	...	...	...	...	290, 291
Knowles v. Blake, 5 Bing. 499	...	...	...	...	...	268
Kooystra v. Lucas, 5 B. & A. 830	...	...	...	...	...	134
Kusel v. Watson, 11 C. D. 129 ; 48 L. J. Ch. 413 ; 27 W. R. 714	...	...	...	...	...	98, 145
Lacey & Son, <i>Re</i> , 25 C. D. 301	...	...	...	...	...	185
Lacy v. Lear, Peake, Add. Cas. 210...	...	...	...	...	...	518
Ladd v. Thomas, 12 A. & E. 117 ; 4 Jur. 798	...	...	...	...	...	273
Ladbury, <i>Ex parte</i> , 17 C. D. 532 ; 50 L. J. Ch. 838 ; 45 L. T. 5	...	...	...	...	...	426
Laing v. Smith, 3 F. & F. 97	...	...	...	...	...	116
Lainson v. Tremere, 1 A. & E. 792	...	...	...	...	...	198
Lamare v. Dixon, L. R. 6 H. L. 414 ; 43 L. J. Ch. 203	...	...	...	...	...	114
Lamb v. Brewster, 4 Q. B. D. 607 ; 48 L. J. Q. B. 421 ; 40 L. T. 537 ; 27 W. R. 478	...	...	...	...	...	201

	PAGE
Lamb v. Wall, 1 F. & F. 503	251
Lambert v. M'Donnell, 15 Ir. C. L. R. 136	459
Lambert v. Norris, 2 M. & W. 333	191, 407
Lancashire Cotton Co., <i>Re</i> , 35 C. D. 656; 56 L. J. Ch. 761; 57 L. T. 511; 36 W. R. 305	302, 303, 304
Lancashire Waggon Co. v. Nuttall, 40 L. T. 291	3
Lancaster, Case of the Duchy of, Plowd. 217	6
Lancaster v. De Trafford, 31 L. J. Ch. 554	106
Lander and Bagley's Contract, <i>Re</i> , '92, 3 Ch. 41; 61 L. J. Ch. 707; 67 L. T. 521	107, 153, 164
Lane v. Cowper, Moore, 103	7
Lane v. Cox, '97, 1 Q. B. 415; 66 L. J. Q. B. 193; 76 L. T. 135; 45 W. R. 261	311
Lane v. Crockett, 7 Price, 566	295
Lane v. Moeder, C. & E. 548	501
Langford v. Selmes, 3 K. & J. 220; 2 Jur. N. S. 859	77, 191, 387
Langley v. Hammond, L. R. 3 Ex. 161; 37 L. J. Ex. 118; 18 L. T. 858; 16 W. R. 937	134
Lant v. Norris, 1 Burr. 287	149, 316
Lanyon v. Carne, 2 Saund. 165	188
Lascelles v. Lord Onslow, 2 Q. B. D. 433; 46 L. J. Q. B. 333; 36 L. T. 459; 25 W. R. 496	64
Last v. Dinn, 28 L. J. Ex. 94	64
Latham v. Atwood, Cro. Car. 515	497, 498
Lavery v. Pursell, 39 C. D. 508; 57 L. J. Ch. 570; 58 L. T. 846; 37 W. R. 163	116
Law v. Local Board of Redditch, '92, 1 Q. B. 127; 61 L. J. Q. B. 172; 66 L. T. 76	159
Lawder v. Blachford, Beat. 522	390
Lawes v. Bennett, 1 Cox, 167	160
Lawrance v. Faux, 2 F. & F. 435	459
Lawrence v. Lawrence, 26 C. D. 795; 53 L. J. Ch. 982; 50 L. T. 715; 32 W. R. 791	214
Lawrence v. Rowley, 27 Sol. Journ. 374	123
Lawrenson v. Butler, 1 Sch. & L. 13	57
Lawrie v. Lees, 14 C. D. 249; 7 App. Cas. 19; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185	13, 72, 471
Lawson v. Storey, 1 Ld. Raym. 19	269
Lawton v. Lawton, 3 Atk. 13	485, 490, 491
Lawton v. Salmon, 1 H. Bl. 259, n. (a)	485, 490
Lay v. Mottram, 19 C. B. N. S. 479	149
Laycock v. Tufnell, 2 Chit. 531	200
Laythoarp v. Bryant, 2 Bing. N. C. 735	108
Layton v. Hurry, 8 Q. B. 811; 15 L. J. Q. B. 244	267
Leach v. Thomas, 7 C. & P. 327	308, 490, 491
Leader v. Homewood, 5 C. B. N. S. 546; 27 L. J. C. P. 316; 4 Jur. N. S. 1062	492
Leader v. Moody, 20 Eq. 145; 44 L. J. Ch. 711; 32 L. T. 422; 23 W. R. 606	2, 373
Lear v. Caldicott, 4 Q. B. 123; 12 L. J. Q. B. 169; 7 Jur. 277	262
Lear v. Edmonds, 1 B. & A. 157	263, 270, 306
Leather Cloth Co. v. Lonsont, 9 Eq. 345; 39 L. J. Ch. 86; 21 L. T. 661; 18 W. R. 572	333
Lee v. Cooke, 2 H. & N. 584; 3 <i>Ibid.</i> 203; 27 L. J. Ex. 337; 4 Jur. N. S. 168	263
Lee v. Edmunds, 1 B. & A. 157	263
Lee v. Gaskell, 1 Q. B. D. 700; 45 L. J. Q. B. 540; 34 L. T. 759; 24 W. R. 824	494
Lee v. Lopes, 15 East, 230	296
Lee v. Rislon, 7 Taunt. 188	494
Lee v. Smith, 9 Ex. 662; 23 L. J. Ex. 198	94, 98, 222
Lee v. Stevenson, E. B. & E. 512; 27 L. J. Q. B. 263	137

	PAGE
Leech v. Schweder, 9 Ch. 463 ; 43 L. J. Ch. 487 ; 30 L. T. 586 ; 22 W. R. 633	372
Leeds v. Cheetham, 1 Sim. 146	207, 310
Lees, <i>Re</i> , 26 C. D. 496 ; 50 L. T. 489 ; 32 W. R. 1005	12
Legg v. Benion, Willes, 43	451
Legh, <i>Ex parte</i> , 15 Sim. 445...	6
Legh v. Heald, 1 B. & Ad. 622	139
Legh v. Hewitt, 4 East, 154...	345
Legh v. Lillie, 6 H. & N. 165 ; 30 L. J. Ex. 25 ; 9 W. R. 55	199, 350
Lehain v. Philpott, L. R. 10 Ex. 242 ; 44 L. J. Ex. 225 ; 33 L. T. 98 ; 23 W. R. 876	217, 305
Lehmann v. McArthur, 3 Eq. 746 ; 16 L. T. 196 ; 15 W. R. 551 ; 3 Ch. 496 ; 37 L. J. Ch. 625 ; 18 L. T. 806 ; 16 W. R. 877	395, 396
Leigh v. Dickeson, 12 Q. B. D. 194 ; 15 <i>Ibid.</i> 60 ; 54 L. J. Q. B. 18 ; 52 L. T. 790 ; 33 W. R. 538	63, 309
Leigh v. Shaw, Cro. Eliz. 372	136
Leigh v. Shepherd, 2 Br. & B. 465	228, 229
Leighton v. Theed, 2 Salk. 413	431
Leitch v. Simpson, Ir. R. 5 Eq. 613	396
Le Kenx v. Nash, 2 Str. 1221	409
Lempriere v. Lange, 12 C. D. 675 ; 41 L. T. 378 ; 27 W. R. 879	10, 11
Le Neve v. Le Neve, 3 Atk. 646	401
Lepia v. Rogers, '93, 1 Q. B. 31 ; 68 L. T. 584	397
Leslie v. Crommelin, 2 Ir. R. Eq. 134	58
Lester v. Foxcroft, Coll. P. C. 108	109
Letchford, <i>Re</i> , 2 C. D. 719 ; 45 L. J. Ch. 530 ; 35 L. T. 466	5
Levy v. Lewis, 9 C. B. N. S. 872 ; 30 L. J. C. P. 141 ; 7 Jur. N. S. 759 ; 9 W. R. 388	512
Levy v. Sale, 37 L. T. 709	157
Lewers v. Earl of Shaftesbury, 2 Eq. 270 ; 12 Jur. N. S. 389 ; 14 L. T. 855...	116
Lewes v. Ridge, Cro. Eliz. 863	401
Lewis v. Fothergill, 5 Ch. 103	342
Lewis v. Read, 13 M. & W. 834 ; 14 L. J. Ex. 295	244, 256
Lewis v. Stephenson, 67 L. J. Q. B. 296 ; 78 L. T. 165...	415
Ley v. Peter, 3 H. & N. 101 ; 27 L. J. Ex. 239	90, 522
Liddell, <i>Re</i> , 31 W. R. 238	5
Lidderdale v. Duke of Montrose, 4 T. R. 248	3
Liddy v. Kennedy, L. R. 5 H. L. 134 ; 20 W. R. 150	446
Liebenrood v. Vines, 1 Mer. 15	347
Liford's Case, 11 Rep. 46 b	139, 230
Liggins v. Inge, 7 Bing. 682	87
Lilley v. Bennett, 5 T. L. R. 156	331
Lillie v. Legh, 3 De G. & J. 204	359
Lincolnshire Finance Co. v. Farrant, 2 T. L. R. 248	481
Linder v. Pryor, 8 C. & P. 518	339
Line v. Stephenson, 4 Bing. N. C. 678 ; 5 <i>Ibid.</i> 183	371
Lingham v. Warren, 2 Ball & B. 36	263
Lisburne (Earl of) v. Davies, L. R. 1 C. P. 259 ; 35 L. J. C. P. 193 ; 12 Jur. N. S. 340 ; 13 L. T. 795 ; 14 W. R. 333	514
Lister v. Brown, 3 D. & Ry. 501	248
Lister v. Lane, '93, 2 Q. B. 212 ; 62 L. J. Q. B. 583 ; 69 L. T. 176 ; 41 W. R. 626	315
Llewellyn v. Earl of Jersey, 11 M. & W. 183	127
Llewellyn v. Williams, Cro. Jac. 258	142
Lloyd v. Cheetham, 3 Giff. 171	3
Lloyd v. Crispe, 5 Taunt. 249	396
Lloyd v. Davies, 2 Ex. 103 ; 18 L. J. Ex. 80	229
Lloyd v. Dimmack, 7 C. D. 398 ; 47 L. J. Ch. 398 ; 38 L. T. 173 ; 26 W. R. 458	157, 412
Lloyd v. Nowell, '95, 2 Ch. 744	103
Lloyd v. Rosbee, 2 Camp. 453	515

	PAGE
Lloyd v. Tomkies, 1 T. R. 671	372
Lloyd and Tooth, <i>Re</i> , '99, 1 Q. B. 559; 68 L. J. Q. B. 376; 80 L. T. 394... ..	507
Llynvi Coal Co., <i>Re</i> , 7 Ch. 28; 41 L. J. Bk. 5; 25 L. T. 609; 20 W. R. 105	428
Loader v. Kemp, 2 C. & P. 375	321
Lobban v. Cooke, 3 H. & N. 238; 27 L. J. M. C. 254; 6 W. R. 498... ..	203
Lock v. Furze, L. R. 1 C. P. 441; 35 L. J. C. P. 141; 15 L. T. 161; 14 W. R. 403	376, 377
Lock v. Pearce, '93, 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569; 41 W. R. 369	473, 474
Locke v. Matthews, 13 C. B. N. S. 753; 32 L. J. C. P. 98; 9 Jur. N. S. 874; 7 L. T. 824; 11 W. R. 343	431, 520
Lockier v. Paterson, 1 C. & K. 271... ..	282
Lockwood v. Coysgarne, 3 Burr. 1676	239
Lockwood v. Wilson, 43 L. J. C. P. 179; 30 L. T. 761; 22 W. R. 919	363
Lofit v. Dennis, 1 E. & E. 474; 28 L. J. Q. B. 168	207, 310
Lofts v. Bourke, 1 T. L. R. 58	72
Logan v. Hall, 4 C. B. 598; 16 L. J. C. P. 252; 11 Jur. 804	359, 389
London v. Greyme, Cro. Jac. 182	326
London v. Southwell, Hob. 303	138
London (Bishop of) v. Web, 1 P. Wms. 527	326
London, Chatham and Dover Ry. Co. v. Bull, 47 L. T. 413	344
London (City of) v. Mitford, 14 Ves. 41	162, 163
London (City of) v. Pugh, 4 Bro. P. C. 395	200
London (City of) v. Nash, 3 Atk. 512	317
London and Colonial Co., <i>Re</i> , Horsey's Claim, 5 Eq. 561... ..	38
London (Corporation of) v. Riggs, 13 C. D. 798; 49 L. J. Ch. 297; 42 L. T. 580; 28 W. R. 610	133
London Freehold Property Co. v. Suffield, '97, 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102	178
London (Mayor of) v. Barnes, 12 T. L. R. 135	321
London (Mayor of) v. Hedger, 18 Ves. 355	329
London and North Western Ry. v. Buckmaster, L. R. 10 Q. B. 70, 444; 44 L. J. M. C. 180; 33 L. T. 329; 24 W. R. 16	84, 86
London and North Western Ry. Co. v. Garnett, 9 Eq. 26; 39 L. J. Ch. 25; 21 L. T. 352; 18 W. R. 246	335
London and North Western Ry. Co. v. West, L. R. 2 C. P. 553; 36 L. J. C. P. 245	76
London and South Western Ry. Co. v. Flower, 1 C. P. D. 77	321
London and South Western Ry. Co. v. Gomm, 20 C. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620	160, 404
London and Suburban Land, &c., Co. v. Field, 16 C. D. 645; 50 L. J. Ch. 549; 44 L. T. 444	336
London and Westminster Loan Co. v. Drake, 6 C. B. N. S. 798; 28 L. J. C. P. 297; 5 Jur. N. S. 1407	461, 493
London and Westminster Loan Co. v. London and North Western Ry. Co., '93, 2 Q. B. 49; 62 L. J. Q. B. 370; 69 L. T. 320; 41 W. R. 670	192, 222
London and Yorkshire Bank v. Belton, 15 Q. B. D. 457; 54 L. J. Q. B. 568; 34 W. R. 31	240
Long v. Clarke, '94, 1 Q. B. 119; 63 L. J. Q. B. 108; 69 L. T. 654; 42 W. R. 130	257, 258
Long v. Millar, 6 C. P. D. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720	105
Long v. Rankin, Sug. Powers, 900	56
Longbottom v. Berry, L. R. 5 Q. B. 123; 39 L. J. Q. B. 37; 22 L. T. 385	481, 483, 487
Longman v. Blount, 12 T. L. R. 520	124, 332
Longstaffe v. Meagoe, 2 A. & E. 167	136
Loring v. Warburton, E. B. & E. 507; 28 L. J. Q. B. 31; 4 Jur. N. S. 634	272

	PAGE
Love v. Pares, 13 East, 80	155, 357
Lovelock v. Franklyn, 8 Q. B. 371; 16 L. J. Q. B. 182; 11 Jur. 1035	125, 174
Lovering, <i>Ex parte</i> , 9 Ch. 586; 43 L. J. Bk. 94; 30 L. T. 621...	427
Low v. Innes, 4 De J. & S. 286	317
Lowe v. Griffith, 1 Scott, 458	10
Lowe v. London and North Western Ry. Co., 18 Q. B. 632; 21 L. J. Q. B. 361; 17 Jur. 375...	23
Lowe v. Peers, 4 Burr. 2225... ..	159
Lowe v. Ross, 5 Ex. 553; 19 L. J. Ex. 318	187, 306
Lowe v. Swift, 2 Ball & B. 536	52
Lowndes v. Fountain, 11 Ex. 487; 25 L. J. Ex. 49	349
Lowrey v. Barker, 5 Ex. D. 170; 49 L. J. Ex. 433; 42 L. T. 215; 28 W. R. 559	423, 425
Lows v. Telford, 1 App. Cas. 414; 45 L. J. Q. B. 613; 35 L. T. 69 ...	68
Lowther v. Heaver, 41 C. D. 248; 58 L. J. Ch. 482; 60 L. T. 310; 37 W. R. 465	81, 114
Loyd v. Langford, 2 Mod. 174	460
Lucas, <i>Re</i> , 55 L. J. Ch. 101; 54 L. T. 30	214
Lucas v. Comerford, 1 Ves. Jun. 235; 3 Bro. C. C. 166; 8 Sim. 499 ...	402
Lucas v. Dixon, 22 Q. B. D. 357; 58 L. J. Q. B. 161; 37 W. R. 370...	105
Lucas v. James, 7 Hare, 410... ..	102
Lucas v. Rideout, L. R. 3 H. L. 153	451
Lucas v. Tarleton, 3 H. & N. 116; 27 L. J. Ex. 246	279, 290, 291
Ludford v. Barber, 1 T. R. 90	51
Ludlow (Mayor of) v. Charlton, 6 M. & W. 823	23
Ludwell v. Newman, 6 T. R. 458	375
Luker v. Dennis, 7 C. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167	407, 408
Lumley v. Metrop. Ry. Co., 34 L. T. 774... ..	335
Lumley v. Ravenscroft, '95, 1 Q. B. 683; 64 L. J. Q. B. 441; 72 L. T. 382; 43 W. R. 584	116
Lumley v. Timms, 28 L. T. 157, 608; 21 W. R. 319, 494	390
Lumsden v. Burnett, '98, 2 Q. B. 177; 67 L. J. Q. B. 661; 78 L. T. 778; 46 W. R. 664	282
Lundy Granite Co., <i>Re</i> , 6 Ch. 462; 40 L. J. Ch. 588; 24 L. T. 922; 19 W. R. 609	302, 303
Lutterel v. Weston, Cro. Jac. 308	65
Luttges v. Sherwood, 11 T. L. R. 233	215
Luxmore v. Robson, 1 B. & A. 584... ..	314
Lybbe v. Hart, 29 C. D. 8; 54 L. J. Ch. 860; 52 L. T. 634	352
Lyburn v. Warrington, 1 Stark. 162	179
Lyddall v. Dunlapp, 1 Wils. 4	420
Lyde v. Russell, 1 B. & Ad. 394	491, 492
Lyell v. Kennedy, 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353	522
Lyle v. Richards, L. R. 1 H. L. 222; 35 L. J. Q. B. 214; 12 Jur. N. S. 947; 15 L. T. 1	128, 129
Lynes v. Snaith, '99, 1 Q. B. 486; 68 L. J. Q. B. 275; 80 L. T. 122; 47 W. R. 411	520
Lynne's (Mayor of) Case, 10 Rep. 12	24
Lyon v. Greenhow, 8 T. L. R. 457... ..	312, 367
Lyon v. Reed, 13 M. & W. 285; 13 L. J. Ex. 377; 8 Jur. 762... ..	457, 458
Lyon v. Tomkies, 1 M. & W. 603	281
Lyon v. Weldon, 2 Bing. 334	275
Lyons v. Elliott, 1 Q. B. D. 210; 45 L. J. Q. B. 159; 33 L. T. 806; 24 W. R. 296	232, 233
Lyster v. Brown, 1 C. & P. 121	246
Macartney v. Garbutt, 24 Q. B. D. 363; 62 L. T. 656; 38 W. R. 559...	239
McCarthy, <i>Re</i> , 7 L. R. Ir. 473	294
McClure v. Little, 19 L. T. 287	316

	PAGE
M'Creesh v. M'Geough, Ir. R. 7 C. L. 236	80
M'Donnell v. Pope, 9 Hare, 705; 16 Jur. 771	457, 458
M'Grath v. Bourne, Ir. R. 10 C. L. 160	289
McGregor v. High, 21 L. T. 803	494
Macher v. Foundling Hospital, 1 V. & B. 188	304, 337
M'Ilroy v. Traill, '98, 1 I. R. 459	114
Mackay, <i>Ex parte</i> , 14 Q. B. D. 401; 33 W. R. 825	427
Mackay v. Mackreth, 4 Doug. 213; 2 Chit. 461	384, 433
Mackenzie, <i>Re</i> , 68 L. J. Q. B. 1003; 43 Sol. Journ. 704	295, 296
Mackenzie v. Hesketh, 7 C. D. 675; 47 L. J. Ch. 231; 38 L. T. 171; 26 W. R. 189	114
Mackintosh and Pontypridd Improvements Co., 61 L. J. Q. B. 164	327
Mackintosh v. Trotter, 3 M. & W. 184	492
Maclean v. Currie, C. & E. 361	332
McManus v. Cooke, 35 C. D. 681; 56 L. J. Ch. 662; 56 L. T. 900; 35 W. R. 754	104, 109
McMurray v. Spicer, 5 Eq. 527	107
Maddison v. Alderson, 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820	109
Maddon v. White, 2 T. R. 159	7, 435
Magdalen College Case, 11 Rep. 76 a	27
Magdalen Hospital v. Knott, 4 App. Cas. 324; 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 602	27, 40, 521
Magee v. Lavell, L. R. 9 C. P. 107; 43 L. J. C. P. 131; 30 L. T. 169; 22 W. R. 334	122, 128
Mahon v. O'Farrell, 10 Ir. L. R. 527	10
Maitland v. Mackinnon, 1 H. & C. 607; 32 L. J. Ex. 49; 6 Jur. N. S. 255; 7 L. T. 427	133
Makin v. Watkinson, L. R. 6 Ex. 25; 40 L. J. Ex. 33; 23 L. T. 592; 19 W. R. 286	321
Maldon's Case, Cro. Eliz. 33	119
Mallam v. Arden, 10 Bing. 299	192, 222
Malpas v. Ackland, 3 Russ. 273	59
Manchester Bonded Warehouse Co. v. Carr, 5 C. P. D. 507; 49 L. J. C. P. 809; 43 L. T. 476; 29 W. R. 354	207, 313, 321, 324
Manchester, Sheffield, and Lincolnshire Rail. Co. v. Anderson, '98, 2 Ch. 394; 78 L. T. 821; 46 W. R. 509	373, 415
Mander v. Falck, '91, 2 Ch. 554; 65 L. T. 203	407
Mander v. Ridgway, '98, 1 Q. B. 501; 67 L. J. Q. B. 335; 78 L. T. 118; 46 W. R. 366	175
Mann v. Lovejoy, Ry. & M. 355	94
Mann v. Nunn, 43 L. J. C. P. 241; 30 L. T. 526	124
Manning v. Fitzgerald, 29 L. J. Ex. 24	127
Manning v. Lunn, 2 C. & K. 13	274, 365
Mansel v. Norton, 22 C. D. 769; 52 L. J. Ch. 357; 48 L. T. 654; 31 W. R. 325	414
Mansell v. Clements, L. R. 9 C. P. 139	71
Mansell's Settled Estate, <i>Re</i> , W. N. 1884, p. 209	70
Manser v. Dix, 8 D. M. & G. 703; 3 Jur. N. S. 252	168
Mansfield (Earl of) v. Blackburne, 6 Bing. N. C. 426	496
Mant v. Collins, cited 2 Q. B. p. 919; 15 L. J. Q. B. p. 248; 10 Jur. p. 390	482
Mantle v. Wollington, Cro. Jac. 166	64
Mantz v. Goring, 4 Bing. N. C. 451	312
Mardell v. Curtis, 43 Sol. Journ. 587	145
Marker v. Kenrick, 13 C. B. 188; 22 L. J. C. P. 129	329
Markey v. Coote, Ir. R. 10 C. L. 149	92
Markham v. Stanford, 14 C. B. N. S. 376	120
Marlborough (Duke of) v. Osborn, 5 B. & S. 67; 33 L. J. Q. B. 148; 10 L. T. 28; 12 W. R. 418	188
Marlborough (Duke of) v. Sartoris, 32 C. D. 616; 56 L. J. Ch. 70; 55 L. T. 506; 35 W. R. 55	46

	PAGE
Marsh <i>v.</i> Curteys, Cro. Eliz. 528	469
Marsh <i>v.</i> Estcourt, 24 Q. B. D. 147; 59 L. J. Q. B. 100; 38 W. R. 495	88
Marshall <i>v.</i> Berridge, 19 C. D. 233; 51 L. J. Ch. 329; 45 L. T. 599;	
30 W. R. 93	107
Marshall <i>v.</i> Corporation of Queenborough, 1 S. & S. 520	24
Marshall <i>v.</i> Mackintosh, 46 W. R. 580	322
Marshall <i>v.</i> Schofield & Co., 52 L. J. Q. B. 58; 47 L. T. 406; 31 W. R.	
134	84, 190, 207
Marshall's Settled Estates, <i>Re</i> , 15 Eq. 66; 27 L. T. 439	19
Marson <i>v.</i> London, Chatham, and Dover Rail. Co., 6 Eq. 101; 37 L. J.	
Ch. 483; 18 L. T. 319	130
Martin, <i>Re</i> , 41 C. D. 381; 58 L. J. Ch. 478; 60 L. T. 555; 37 W. R. 497	184
Martin <i>v.</i> Coulman, 4 L. J. K. B. 37	499
Martin <i>v.</i> Croupe, 1 Ld. Raym. 340	64
Martin <i>v.</i> Gilham, 7 A. & E. 540	308, 328
Martin <i>v.</i> Pycroft, 2 D. M. & G. 785; 22 L. J. Ch. 94; 16 Jur. 1125	121
Martin <i>v.</i> Roe, 7 E. & B. 244; 26 L. J. Q. B. 129; 3 Jur. N. S. 465	487
Martin <i>v.</i> Smith, L. R. 9 Ex. 50; 43 L. J. Ex. 42; 30 L. T. 268; 22	
W. R. 336	94, 98
Martyn <i>v.</i> Clue, 18 Q. B. 661; 22 L. J. Q. B. 147	318, 404
Martyn <i>v.</i> Williams, 1 H. & N. 817; 26 L. J. Ex. 117	404, 415
Martyr <i>v.</i> Bradley, 9 Bing. 24	495
Martyr <i>v.</i> Lawrence, 2 D. J. & S. 261	127
Mascal's Case, 1 Leon. 62	417
Mashiter <i>v.</i> Smith, 3 T. L. R. 673	386
Mason <i>v.</i> Cole, 4 Ex. 375; 18 L. J. Ex. 478	154
Mason <i>v.</i> Corder, 7 Taunt. 9	396
Mason's Orphanage, <i>Re</i> , 1896, 1 Ch. 596; 65 L. J. Ch. 439; 74 L. T.	
161; 44 W. R. 339	39
Massey <i>v.</i> Goodall, 17 Q. B. 310; 20 L. J. Q. B. 526; 15 Jur. 991	349
Master <i>v.</i> Hansard, 4 C. D. 718; 46 L. J. Ch. 505; 36 L. T. 535; 25 W. R. 570	408
Master <i>v.</i> Miller, 1 Sm. L. C. (10th edition), 747; 4 T. R. 320	180
Masters <i>v.</i> Farris, 1 C. B. 715	288
Masters <i>v.</i> Green, 20 Q. B. D. 807; 59 L. T. 476; 36 W. R. 591	2, 240
Mather <i>v.</i> Fraser, 2 K. & J. 536; 25 L. J. Ch. 361; 3 Jur. N. S. 900	480,
	481, 483, 484, 487
Matheson <i>v.</i> Ross, 2 H. L. C. 286	175
Mathews <i>v.</i> Whetton, Cro. Car. 233	65
Mathias <i>v.</i> Mesnard, 2 C. & P. 353	231, 232
Matthews <i>v.</i> Baxter, L. R. 8 Ex. 132; 42 L. J. Ex. 73; 28 L. T. 169;	
21 W. R. 389	74
Matthews <i>v.</i> Sawell, 8 Taunt. 270	454
Matthews <i>v.</i> Usher, 68 L. J. Q. B. 988	472, 474, 524
Matts <i>v.</i> Hawkins, 5 Taunt. 20	354
Matures <i>v.</i> Westwood, Cro. Eliz. 599	404
Maughan, <i>Re</i> , 14 Q. B. D. 956; 54 L. J. Q. B. 128; 33 W. R. 308	82, 424
Mavor <i>v.</i> Croome, 1 Bing. 261	299
Maw <i>v.</i> Hindmarsh, 21 L. T. 644	339
Mayfield <i>v.</i> Robinson, 7 Q. B. 486; 9 Jur. 826	120
Mayhew <i>v.</i> Suttle, 4 E. & B. 347; 24 L. J. Q. B. 54; 1 Jur. N. S. 303	87, 434
Mayho <i>v.</i> Buckhurst, Cro. Jac. 438	406
Maynard, <i>Re</i> , '99, 2 Ch. 347; 68 L. J. Ch. 609; 43 Sol. Journ. 676	52
Meath <i>v.</i> Cuthbert, Ir. R. 10 C. L. 395	208
Mechelen <i>v.</i> Wallace, 7 A. & E. 49	104
Medwin <i>v.</i> Sandham, 3 Swanst. 685	57, 154
Meesing <i>v.</i> Kemble, 2 Camp. 115	291
Megson <i>v.</i> Mapleton, 49 L. T. 744; 32 W. R. 318	255, 256
Mellers <i>v.</i> Devonshire, 16 Beav. 252; 22 L. J. Ch. 310	208, 342
Melling <i>v.</i> Leak, 16 C. B. 652; 24 L. J. C. P. 187; 1 Jur. N. S. 759	92
Mellor <i>v.</i> Watkins, L. R. 9 Q. B. 400; 23 W. R. 55	87, 460
Melwich <i>v.</i> Luter, 4 Rep. 26 a	64
Mennie <i>v.</i> Blake, 6 E. & B. 842; 25 L. J. Q. B. 399	283

	PAGE
<i>Merceron v. Dowson</i> , 5 B. & C. 479	402
<i>Meredith v. Wilson</i> , 69 L. T. 336	344
<i>Meres v. Ansell</i> , 3 Wils. 275	121
<i>Merrill v. Frame</i> , 4 Taunt. 329	371
<i>Messenger v. Armstrong</i> , 1 T. R. 53	144, 515
<i>Messent v. Reynolds</i> , 3 C. B. 194; 15 L. J. C. P. 226; 10 Jur. 550	369
<i>Metropolitan Counties Society v. Brown</i> , 26 Beav. 454; 28 L. J. Ch. 581; 5 Jur. N. S. 378; 7 W. R. 303	480, 484
<i>Metropolitan Counties Assurance Co. v. Brown</i> , 4 H. & N. 428; 28 L. J. Ex. 340	83
<i>Metropolitan District Rail. Co. and Cosh, Re</i> , 13 C. D. 607; 49 L. J. Ch. 277; 42 L. T. 73; 28 W. R. 685	140
<i>Meux v. Cobley</i> , '92, 2 Ch. 253; 61 L. J. Ch. 449; 66 L. T. 86	324, 327, 329, 348
<i>Meux v. Jacobs</i> , L. R. 7 H. L. 481; 44 L. J. Ch. 481; 32 L. T. 171; 23 W. R. 526	487, 493
<i>Mexborough (Earl of) v. Whitwood Urban District Council</i> , '97, 2 Q. B. 111	465
<i>Mexborough (Earl of) and Wood, Re</i> , 47 L. T. 516	199
<i>Micklethwait v. Winter</i> , 6 Ex. 644	131
<i>Middlemore v. Goodale</i> , Cro. Car. 503	405
<i>Middleton v. Dodswell</i> , 13 Ves. 266	59, 60
<i>Middleton v. Magnay</i> , 2 Hem. & M. 233	116
<i>Midgley v. Smith</i> , 1893, W. N., p. 120	398
<i>Midland Rail. Co. v. Cleckley</i> , 4 Eq. 19	131
<i>Midland Rail. Co. v. Haunchwood, &c. Co.</i> , 20 C. D. 552; 51 L. J. Ch. 778; 46 L. T. 301; 30 W. R. 640	131
<i>Midland Rail. Co. v. Robinson</i> , 37 C. D. 386	132
<i>Mildmay v. Shirley</i> , cited 10 East, 164	96
<i>Mile End Old Town, Vestry of v. Whitby</i> , 78 L. T. 80	364
<i>Miles v. Furber</i> , L. R. 8 Q. B. 77; 42 L. J. Q. B. 41; 27 L. T. 756; 21 W. R. 262	218, 233
<i>Miles v. Tobin</i> , 17 L. T. 432; 16 W. R. 465	468
<i>Miller v. Aldworth</i> , '99, 1 Ch. 622; 68 L. J. Ch. 322; 80 L. T. 77; 47 W. R. 268	110
<i>Miller v. Green</i> , 2 Tyr. 1	234
<i>Miller v. Hancock</i> , '93, 2 Q. B. 177; 69 L. T. 214; 41 W. R. 578	310
<i>Miller v. Maynaring</i> , Cro. Car. 397	20, 142
<i>Miller v. Pratt</i> , Dyer, 264 a, n. (40)	136
<i>Miller v. Tebb</i> , 9 T. L. R. 515	258
<i>Milliner v. Robinson</i> , Moore, 682	64
<i>Mills v. E. London Union</i> , L. R. 8 C. P. 79; 42 L. J. C. P. 46; 27 L. T. 557; 21 W. R. 142	322
<i>Mills v. Haywood</i> , 6 C. D. 196	161
<i>Mills v. Goff</i> , 14 M. & W. 72; 14 L. J. Ex. 249	441
<i>Mills v. Temple-West</i> , 1 T. L. R. 503	311
<i>Mills v. Trumper</i> , 4 Ch. 320; 20 L. T. 384; 17 W. R. 428	213
<i>Millership v. Brookes</i> , 5 H. & N. 797	178
<i>Milne v. Taylor</i> , 16 L. T. O. S. 172	208
<i>Milner v. Jordan (or Myers)</i> , 8 Q. B. 615; 15 L. J. Q. B. 157; 10 Jur. 472	500
<i>Milsom v. Stafford</i> , 80 L. T. 590	124
<i>Minet v. Johnson</i> , 63 L. T. 507	525
<i>Minshall v. Lloyd</i> , 2 M. & W. 450; 1 Jur. 336	492, 493
<i>Miushull v. Oakes</i> , 2 H. & N. 793; 27 L. J. Ex. 194; 4 Jur. N. S. 170	406
<i>Minton v. Gleiger</i> , 28 L. T. 449	130
<i>Metcalfe v. Westaway</i> , 17 C. B. N. S. 658; 34 L. J. C. P. 113	137
<i>Mitchell v. Fordham</i> , 6 B. & C. 274	365
<i>Mitchell v. Lee</i> , 8 B. & S. 92; L. R. 2 Q. B. 259; 36 L. J. Q. B. 154; 15 L. T. 502; 15 W. R. 337	198
<i>Mitchell v. Reynolds</i> , 1 P. Wms. 181	333
<i>Mitchison v. Thomson</i> , C. & E. 72	474
<i>Modlen v. Snowball</i> , 4 D. F. & J. 143; 31 L. J. Ch. 44	114
<i>Moffett v. Gough</i> , 1 L. R. Ir. 331	57

Mogridge v. Clapp, 1892, 3 Ch. 382 ; 61 L. J. Ch. 534 ; 67 L. T. 100 ; 40 W. R. 663	...	...	...	...	...	44, 46, 49,	112
Mogg v. Yatton, 29 W. R. 74	...	...	...	...	...	...	84
Mollett v. Brayne, 2 Camp. 103	...	...	...	...	...	...	455
Molony v. Kernan, 2 Dr. & War. 31	...	...	...	...	...	...	73
Molton v. Camroux, 2 Ex. 487 ; 4 Ex. 17 ; 18 L. J. Ex. 68, 356	...	...	...	...	...	...	14
Monk v. Cooper, 2 Str. 763	...	...	...	...	...	...	207
Monk v. Noyes, 1 C. & P. 265	...	...	...	...	...	...	315
Montague's Case, Lady, Cro. Jac. 301	...	...	...	...	...	65,	66
Montgomery v. Earl of Wemiss (The Queensberry Leases), 5 Dow, 293...	...	...	...	...	...	...	54
Moodie v. Garnance, 3 Bulstr. 153	...	...	...	...	...	...	211
Moody v. Steggles, 12 C. D. 261	...	...	...	...	...	...	484
Moore, <i>Ex parte</i> , 2 C. D. 802 ; 35 L. T. 386 ; 28 W. R. 720	...	...	...	...	...	...	427
Moore v. Clark, 5 Taunt. 90	...	...	...	...	...	...	321
Moore v. Clench, 1 C. D. 447 ; 45 L. J. Ch. 80 ; 34 L. T. 13 ; 24 W. R. 169	...	...	...	...	...	...	26
Moore v. Doherty, 5 Ir. L. R. 449...	...	...	...	...	...	...	520
Moore v. Drinkwater, 1 F. & F. 134	...	...	...	...	...	...	256
Moore v. Foley, 6 Ves. 232	...	...	...	...	...	...	162
Moore v. Greg, 2 Ph. 717	...	...	...	...	...	...	402
Moore v. Plymouth, 7 Taunt. 614	...	...	...	...	...	...	382
Moore v. Pyrke, 11 East, 52	...	...	...	...	...	...	279
Moore and Robinson's Banking Co., <i>Ex parte</i> , 14 C. D. 379 ; 49 L. J. Bk. 60 ; 42 L. T. 443 ; 28 W. R. 924	...	...	...	...	...	...	481
Moore v. Robinson, 48 L. J. Q. B. 156 ; 40 L. T. 99 ; 27 W. R. 312	...	...	...	...	...	...	339
Moore v. Choat, 8 Sim. 508 ; 3 Jur. 220	...	...	...	...	...	...	402
Morden v. Porter, 7 C. B. N. S. 641	...	...	...	...	...	...	380
More's Case, Sir William, Cro. Eliz. 26	...	...	...	...	...	...	393
Morgan, <i>Re</i> , 24 C. D. 114 ; 53 L. J. Ch. 85 ; 48 L. T. 964 ; 31 W. R. 948	4,	48	...	...	...	...	...
Morgan, <i>Re</i> , 22 Q. B. D. 592 ; 58 L. J. Q. B. 295 ; 60 L. T. 941 ; 37 W. R. 344...	...	...	...	...	...	...	427
Morgan v. E. of Abergavenny, 8 C. B. 768	...	...	...	...	...	...	235
Morgan v. Bissell, 3 Taunt. 65	...	...	...	...	...	79, 80,	124
Morgan v. Davies, 3 C. P. D. 260 ; 39 L. T. 60 ; 26 W. R. 816	...	...	...	...	...	...	437
Morgan v. Griffith, 7 Mod. 380	...	...	...	...	...	...	286
Morgan v. Griffith, L. R. 6 Ex. 70 ; 40 L. J. Ex. 46 ; 23 L. T. 783 ; 19 W. R. 957	...	...	...	...	...	123,	383
Morgan v. Hardy, 17 Q. B. D. 770 ; affirmed, 35 W. R. 588	...	...	...	...	...	323,	412
Morgan v. Jackson, '95. 1 Q. B. 885 ; 64 L. J. Q. B. 462 ; 72 L. T. 593 ; 43 W. R. 479	...	...	...	...	...	...	381
Morgan v. Milman, 3 D. M. & G. 24	...	...	...	...	...	...	56
Moritz v. Knowles, 43 Sol. Journ. 529	...	...	...	...	...	...	102
Morley v. Carter, '98, 1 Q. B. 8 ; 66 L. J. Q. B. 843 ; 77 L. T. 337 ; 46 W. R. 77	...	...	...	...	...	...	507
Morley v. Jones, 32 Sol. Journ. 630...	...	...	...	...	...	...	502
Morley v. Pincomb, 2 Ex. 101 ; 18 L. J. Ex. 272...	...	...	...	...	...	...	233
Moroney v. Macnamara, Jr. R. 6 C. L. 181 ; 20 W. R. 905	...	...	...	...	...	...	137
Morphett v. Jones, 1 Swanst. 172	...	...	...	...	...	109,	110
Morrell v. Fisher, 4 Ex. 591 ; 19 L. J. Ex. 273	...	...	...	...	...	127,	128
Morris v. Edgington, 3 Taunt. 24	...	...	...	...	...	133,	134
Morris v. Elme, 1 Ves. 139	...	...	...	...	...	...	72
Morris v. Kennedy, '96, 2 Ir. R. 247	...	...	...	...	...	314,	417
Morris v. Matthews, 2 Q. B. 293 ; 11 L. J. Q. B. 57	...	...	...	...	...	...	286
Morris v. Rhydydefed Colliery Co., 3 H. & N. 885 ; 28 L. J. Ex. 119	...	...	...	...	...	...	55
Morris v. Smith, 3 Doug. 279	...	...	...	...	...	...	343
Morrison v. Chadwick, 7 C. B. 266 ; 18 L. J. C. P. 189	...	...	...	...	...	...	209
Mortal v. Lyons, 8 Ir. Ch. R. 112	...	...	...	...	...	71,	109
Mortimer v. Shortall, 2 Dr. & War. 363	...	...	...	...	...	...	187
Morton v. Palmer, 51 L. J. Q. B. 7 ; 45 L. T. 426 ; 30 W. R. 115	...	...	...	...	...	...	242
Morton v. Woods, 9 B. & S. 632 ; L. R. 4 Q. B. 293 ; 38 L. J. Q. B. 81 ; 17 W. R. 414 : affirming 37 L. J. Q. B. 242 ; 18 L. T. 791	...	...	...	...	...	...	75
	...	...	...	...	...	83, 220,	433
Moser, <i>Re</i> , 13 Q. B. D. 738 ; 33 W. R. 16	...	...	...	...	...	...	433
Moses v. Taylor, 11 W. R. 81	...	...	...	...	...	337,	344

	PAGE
<i>Moss v. Barton</i> , 35 Beav. 197 ; 1 Eq. 474 ; 13 L. T. 623	100
<i>Moss v. Gallimore</i> , 1 Doug. 279	67, 196, 224, 272
<i>Moss v. James</i> , 37 L. T. 715 ; 47 L. J. Q. B. 160 ; 38 L. T. 595	393, 461
<i>Mostyn v. Lancaster</i> , 23 C. D. 583 ; 52 L. J. Ch. 848 ; 48 L. T. 715 ; 31 W. R. 686	54
<i>Mostyn v. West Mostyn Coal Co.</i> , 1 C. P. D. 145 ; 45 L. J. C. P. 401 ; 34 L. T. 325 ; 24 W. R. 401	187, 370
<i>Moule v. Garrett</i> , L. R. 5 Ex. 132 ; 7 Ex. 101 ; 41 L. J. Ex. 62 ; 26 L. T. 367 ; 20 W. R. 416	410, 411
<i>Mountnoy v. Collier</i> , 1 E. & B. 630 ; 22 L. J. Q. B. 124 ; 17 Jur. 503	77, 209
<i>Mousley v. Ludlam</i> , 21 L. J. Q. B. 64 ; 15 Jur. 1107	499
<i>Moxon v. Townshend</i> , 2 T. L. R. 717 ; 3 <i>Ib.</i> 392... ..	315
<i>Muckleston v. Thomas</i> , Willes, 146	318
<i>Munford v. Collier</i> , 25 Q. B. D. 279 ; 59 L. J. Q. B. 552 ; 38 W. R. 716	84
<i>Muncey v. Dennis</i> , 1 H. & N. 216 ; 26 L. J. Ex. 66	500
<i>Mundav v. Asprey</i> , 13 C. D. 855 ; 49 L. J. Ch. 216 ; 42 L. T. 143 ; 28 W. R. 347	105
<i>Mundy v. Jolliffe</i> , 5 My. & Cr. 167	110
<i>Mundy v. Duke of Rutland</i> , 23 C. D. 81 ; 46 L. T. 477 ; 31 W. R. 510	135
<i>Municipal Building Society v. Smith</i> , 22 Q. B. D. 70 ; 58 L. J. Q. B. 61 ; 37 W. R. 42	67, 225
<i>Municipal Freehold Land Co. v. Metropolitan, &c. Joint Committee</i> , C. & E. 184	84
<i>Munn v. Godbold</i> , 3 Bing. 292	176
<i>Murgatroyd v. Old Silkstone, &c. Coal Co.</i> , 65 L. J. Ch. 111 ; 44 W. R. 198	82
<i>Murphy v. Daly</i> , 13 Ir. C. L. R. 239	326
<i>Murray v. Hall</i> , 7 C. B. 455... ..	63
<i>Murray v. Parker</i> , 19 Beav. 305	187
<i>Murrell v. Fysh</i> , C. & E. 80	412
<i>Musgrave v. Horner</i> , 31 L. T. 632 ; 23 W. R. 125	350
<i>Muskerrey v. Chinnery</i> , Ll. & Goo. temp. Sugden, 185	54
<i>Muskett v. Hill</i> , 5 Bing. N. C. 694	87, 442
<i>Muspratt v. Gregory</i> , 1 M. & W. 633 ; 3 <i>Ib.</i> 677	230, 231, 232, 233
<i>Nargett v. Nias</i> , 1 E. & E. 439 ; 28 L. J. Q. B. 143 ; 5 Jur. N. S. 198	240
<i>Nash v. Cochrane</i> , 3 Jur. 973	114, 388
<i>Nash v. Gray</i> , 2 F. & F. 391... ..	194
<i>Nash v. Lucas</i> , 8 B. & S. 531 ; L. R. 2 Q. B. 590 ; 16 L. T. 610	257, 258
<i>Nash v. Palmer</i> , 5 M. & S. 374	372
<i>Nash v. Spencer</i> , 13 T. L. R. 78	307
<i>Nation v. Tozer</i> , 1 Cr. M. & R. 172... ..	420
<i>National Savings Bank Association, Re, Brady's Case</i> , 15 W. R. 753	111
<i>National Telephone Co. v. Commissioners of Inland Revenue</i> , '99, 1 Q. B. 250 ; 68 L. J. Q. B. 222 ; 79 L. T. 514 ; 47 W. R. 247	84, 171
<i>Naylor v. Arnitt</i> , 1 Russ. & M. 501... ..	59
<i>Naylor v. Collinge</i> , 1 Taunt. 19	316, 495
<i>Neale v. Mackenzie</i> , 1 M. & W. 747 ; 2 Cr. M. & R. 84	186, 212, 221
<i>Neale v. Mackenzie</i> , 1 Keen, 474	114
<i>Neale v. Perkin</i> , 1 Esp. 229	131
<i>Neale v. Ratcliffe</i> , 15 Q. B. 916 ; 20 L. J. Q. B. 130 ; 15 Jur. 166	318
<i>Neale v. Wyllie</i> , 3 B. & C. 533	389
<i>Neave v. Moss</i> , 1 Bing. 360	77
<i>Negus, Re</i> , '95, 1 Ch. 73 ; 64 L. J. Ch. 79 ; 71 L. T. 716 ; 43 W. R. 68 183, 184	
<i>Nelson v. Liverpool Brewery Co.</i> , 2 C. P. D. 311 ; 46 L. J. C. P. 675 ; 25 W. R. 877	311
<i>Nesham v. Selby</i> , 13 Eq. 191 ; 7 Ch. 406 ; 41 L. J. Ch. 551 ; 26 L. T. 568... ..	99, 102, 106
<i>Ness v. Stephenson</i> , 9 Q. B. D. 245... ..	242
<i>Newbolt v. Bingham</i> , 72 L. T. 852	476
<i>Newby v. Eckersley</i> , '99, 1 Q. B. 465 ; 68 L. J. Q. B. 261 ; 80 L. T. 314 ; 47 W. R. 245	505

	PAGE
Newby v. Harrison, 1 J. & H. 393; 4 L. T. 397; 9 W. R. 849; affirmed 4 L. T. 424	85
Newby v. Sharpe, 8 C. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 26 W. R. 685	210
Newcastle's Estates, <i>Re</i> Duke of, 24 C. D. 129; 52 L. J. Ch. 645; 48 L. T. 779; 31 W. R. 782	5, 48
New City Club, <i>Re</i> , 34 C. D. 646; 56 L. J. Ch. 332; 56 L. T. 792; 35 W. R. 421	303
Newcomb v. Harvey, Carth. 161	387
Newcomen v. Colson, 5 C. D. 133; 46 L. J. Ch. 459; 36 L. T. 385; 25 W. R. 469...	129
Newitt, <i>Ex parte</i> , 16 C. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344...	468
Newman, <i>Re</i> , 2 Ch. 707; 36 L. J. Ch. 843; 17 L. T. 128; 15 W. R. 1189	184
Newman v. Anderton, 2 B. & P. N. R. 224	190
Newman v. Maxwell, 80 L. T. 681	357
Newmarch v. Brandling, 3 Swanst. 99	2
New Oriental Bank Corporation, Lim., <i>Re</i> , '95, 1 Ch. 753; 64 L. J. Ch. 439; 72 L. T. 419; 43 W. R. 523	305
Newport v. Hardy, 2 Dowl. & L. 921; 14 L. J. Q. B. 242; 10 Jur. 333	209, 211
Newsome v. Graham, 10 B. & C. 234	198
Newsou v. Smythies, 3 H. & N. 840; 1 F. & F. 477; 28 L. J. Ex. 97	155, 347, 499
Newton v. Allin, 1 Q. B. 518; 10 L. J. Q. B. 179; 6 Jur. 99	209
Newton v. Harland, 1 M. & Gr. 644; 1 Sc. N. R. 473; 2 Jur. 350	519
Newton v. Lucas, cited 10 Beav. 543	59
Newton v. Nock, 43 L. T. 197	341, 352
Newton v. Scott, 9 M. & W. 434; 10 <i>Ib.</i> 471; 11 L. J. Ex. 121	301
Newton v. Wilmot, 8 M. & W. 711...	375, 383
Niblet v. Smith, 4 T. R. 504	284
Nicholson v. Smith, 22 C. D. 640; 52 L. J. Ch. 191; 47 L. T. 650; 31 W. R. 471...	162, 163
Nickells v. Atherstone, 10 Q. B. 944; 16 L. J. Q. B. 371; 11 Jur. 778	458
Nicoll v. Fenning, 19 C. D. 258; 51 L. J. Ch. 166; 45 L. T. 738; 30 W. R. 95	336
Nicolls v. Corbett, 34 Beav. 376	59
Nind v. Marshall, 1 Ball & B. 319	372
Nind v. Nineteenth Century Building Society, '94, 2 Q. B. 226; 63 L. J. Q. B. 636; 70 L. T. 831; 42 W. R. 481	475
Nixon v. Freeman, 5 H. & N. 652; 29 L. J. Ex. 273	258
Noke v. Awder, Cro. Eliz. 373, 436...	405
Nokes's Case, 4 Rep. 80 b	371
Nokes v. Fish, 3 Drew. 735	403
Nokes v. Gibbon, 3 Drew. 681; 26 L. J. Ch. 433; 3 Jur. N. S. 726	313
Nordenfelt v. Maxim-Nordenfelt Co., '94, A. C. 535	333
Norman v. Ricketts, 3 T. L. R. 182...	215
Norris v. Catmur, C. & E. 576	311
Norris v. Craig, 64 L. J. Q. B. 432; 43 W. R. 480	387
North v. Percival, '98, 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 46 W. R. 552...	103
Northcote v. Doughty, 4 C. P. D. 385	8
North London Freehold Land Co. v. Jacques, 49 L. T. 659; 32 W. R. 283	473
Northumberland Avenue Hotel Co., <i>Re</i> , 33 C. D. 16; 54 L. T. 76, 777	94, 116
Northumberland, Duke of v. Errington, 5 T. R. 522	156
North Western Railway Co. v. McMichael, 5 Ex. 114	7, 10
Northwick v. Stanway, 3 B. & P. 346	64
North Yorkshire Iron Co., <i>Re</i> , 7 C. D. 661; 47 L. J. Ch. 333; 38 L. T. 143; 26 W. R. 367	303
Norton v. Dashwood, '96, 2 Ch. 497; 65 L. J. Ch. 737; 75 L. T. 205; 44 W. R. 680	490

	PAGE
Norton v. Herron, 1 C. & P. 648	72
Norval v. Pascoe, 34 L. J. Ch. 82; 10 Jur. N. S. 792; 10 L. T. 809; 12 W. R. 973	87, 402, 405
Norwood (Overseers of) v. Salter, '92, 2 Q. B. 118; 61 L. J. M. C. 193; 67 L. T. 376	362
Nottingham Brick Co. v. Butler, 15 Q. B. D. 261; 16 Q. B. D. 778; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405	403
Novello v. Toogood, 1 B. & C. 554	239
Noye v. Reed, 1 Man. & Ry. 63	354
Nugent v. Kirwan, 1 Jebb. & Sy. 97	233
Nunn v. Fabian, 1 Ch. 35; 35 L. J. Ch. 140; 11 Jur. N. S. 868; 13 L. T. 343	109, 110
Nuttall v. Staunton, 4 B. & C. 51	251
Oakapple v. Copous, 4 T. R. 361	439
Oakley v. Monck, L. R. 1 Ex. 159; 35 L. J. Ex. 87; 14 L. T. 20; 14 W. R. 406; 4 H. & C. 251	69, 96, 97, 98, 486, 492
Oak Pits Colliery Co., <i>Re</i> , 21 C. D. 322; 51 L. J. Ch. 768; 47 L. T. 7; 30 W. R. 759	303
Oastler v. Henderson, 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T. 22	456
Oates v. Frith, Hob. 130; 2 Rol. Abr. 447, pl. 3	148, 191
Oceanic Steam Navigation Co. v. Sutherland, 16 C. D. 236; 50 L. J. Ch. 308; 43 L. T. 743; 29 W. R. 113	58, 59, 60, 62
O'Connor v. Spaight, 1 Sch. & Lef. 305	104
Odell v. Wake, 3 Camp. 394	469
O'Donoghue v. Coalbrook, &c. Co., 26 L. T. 806	206
Ogilvie v. Foljambe, 3 Mer. 53	107, 108
Oland's Case, 5 Rep. 116 a	497
Oldershaw v. Holt, 12 A. & E. 590; 4 Jur. 1012	322
Oliver v. Hunting, 44 C. D. 205; 59 L. J. Ch. 255; 62 L. T. 108; 38 W. R. 618	105
Omerod v. Hardman, 5 Ves. 722	121
Onions v. Cohen, 2 Hem. & M. 354; 34 L. J. Ch. 338	372
Onslow v. Corrie, 2 Madd. 330... ..	409, 423
Onslow v. —, 16 Ves. 173	345, 346
Oppenheim v. British, &c. Investment Bank, 6 C. D. 744; 46 L. J. Ch. 882; 37 L. T. 629; 26 W. R. 391	304
Openshaw v. Evans, 50 L. T. 156	316
Opperman v. Smith, 4 D. & Ry. 33	248
Orby v. Mohun, Gilb. Eq. R. 45	53
Orgill v. Kemshead, 4 Taunt. 642	410
Orme v. Broughton, 10 Bing. 533	113
Ormond v. Hutchinson, 16 Ves. 94	73
Osborn v. Wise, 7 C. & P. 761	122
Osborn v. D. of Marlborough, 14 L. T. 789; 12 Jur. N. S. 559; 14 W. R. 886	43
Our Boys' Clothing Co. v. Holborn, &c. Co., 12 T. L. R. 344	338
Ontram v. Maude, 17 C. D. 391; 50 L. J. Ch. 783; 29 W. R. 818	512
Owen v. Legh, 3 B. & A. 470	281
Owens v. Wynne, 4 E. & B. 579	263
Oxford, Mayor of v. Crow, '93, 3 Ch. 535; 69 L. T. 228; 42 W. R. 200	24, 114
Oxford v. Provand, L. R. 2 P. C. 136	114
Oxley v. James, 13 M. & W. 209; 13 L. J. Ex. 358	93, 228, 384
Packer v. Gibbins, 1 Q. B. 421; 10 L. J. Q. B. 224; 5 Jur. 1036	207
Paddington Charities, <i>Re</i> , 8 Sim. 629; 7 L. J. Ch. 44; 2 Jur. 344	36
Paddock v. Findlay, 1 Cr. & J. 90	122
Padwick v. King, 29 L. J. M. C. 42	380
Page v. Broom, 3 Beav. 36	116
Page v. Moore, 15 Q. B. 684... ..	438, 515
Page v. Norfolk, 70 L. T. 23, 781	103
Page v. Stedman, Carth. 364	229

Paget's Settled Estates, <i>Re</i> , 30 C. D. 161 ; 55 L. J. Ch. 42 ; 53 L. T. 90 ; 33 W. R. 898	49
Paget v. Marshall, 28 C. D. 255 ; 54 L. J. Ch. 575 ; 51 L. T. 351 ; 33 W. R. 608	187
Pain v. Coombs, 1 De G. & J. 34 ; 3 Jur. N. S. 847	110
Palfrey v. Baker, 3 Price, 572	215
Palgrave v. Windham, 1 Str. 212	295
Palmer v. Bramley, '95, 2 Q. B. 405 ; 65 L. J. Q. B. 42 ; 73 L. T. 329	215
Palmer v. Earith, 14 M. & W. 428 ; 14 L. J. Ex. 256	365
Palmer v. Edwards, 1 Dougl. 187, n.	387
Palmer v. Ekins, 2 Ld. Raym. 1550	75, 76
Palmer v. Johnson, 13 Q. B. D. 351 ; 53 L. J. Q. B. 348 ; 51 L. T. 211 ; 33 W. R. 36	112
Palmer v. Thorpe, Cro. Eliz. 152	186
Pannel v. Mill, 3 C. B. 625 ; 16 L. J. C. P. 91	137
Panther Lead Co., <i>Re</i> , '96, 1 Ch. 978 ; 65 L. J. Ch. 499 ; 44 W. R. 573	305
Panton v. Isham, 3 Lev. 359	328
Panton v. Jones, 3 Camp. 372	78, 448
Papé v. Westmacott, '94, 1 Q. B. 272 ; 63 L. J. Q. B. 222 ; 70 L. T. 18 ; 42 W. R. 131	215
Papillon v. Brunton, 5 H. & N. 518 ; 29 L. J. Ex. 265	447
Paradine v. Jane, Aleyn, 26	207
Paramour v. Yardley, Plowd. 539	419
Pargeter v. Harris, 7 Q. B. 708 ; 15 L. J. Q. B. 113 ; 10 Jur. 260	75
Parish v. Sleeman, 1 D. F. & J. 326 ; 29 L. J. Ch. 96 ; 6 Jur. N. S. 385 ; 8 W. R. 166	151, 363, 365
Parker v. Harris, 1 Salk. 262	147
Parker v. Manning, 7 T. R. 537	76
Parker v. Taswell, 2 De G. & J. 559 ; 27 L. J. Ch. 812 ; 4 Jur. N. S. 1006	114, 119
Parker v. Webb, 3 Salk. 5	405
Parker v. Whyte, 1 Hem. & M. 167 ; 32 L. J. Ch. 520 ; 8 L. T. 446 ; 11 W. R. 683	408
Parkinson v. Potter, 16 Q. B. D. 152 ; 55 L. J. Q. B. 153 ; 53 L. T. 818 ; 34 W. R. 215	366
Parmerter v. Webber, 8 Taunt. 593	191, 387
Parrott v. Anderson, 7 Ex. 93 ; 21 L. J. Ex. 291	215
Parry v. Deere, 5 A. & E. 551	172, 174
Parry v. Duncan, 7 Bing. 243	248, 249, 288
Parry v. Herbert, 4 Leon. 5	393
Parry v. Hindle, Cro. Eliz. 216	20
Parry v. House, Holt, N. P. 489	75
Parsons v. Giugell, 4 C. B. 545 ; 16 L. J. C. P. 227 ; 11 Jur. 437	232, 233
Parsons v. Hind, 14 W. R. 860	483
Partridge v. Ball, 1 Ld. Raym. 136	120
Partridge v. Naylor, Cro. Eliz. 480	267
Pascoe v. Pascoe, 3 Bing. N. C. 898	222, 387
Paterson, <i>Ex parte</i> , 11 C. D. 908 ; 41 L. T. 249 ; 27 W. R. 928	424
Patman v. Harland, 17 C. D. 353 ; 50 L. J. Ch. 642 ; 44 L. T. 728 ; 29 W. R. 707	112, 409
Paton v. Carter, C. & E. 183	218
Patten v. Patten, Alcock & Napier, 493	61
Patten v. Reid, 6 L. T. 281	422
Pattle v. Anstruther, 69 L. T. 175 ; 41 W. R. 625	107
Pattle v. Hornibrook, '97, 1 Ch. 25 ; 66 L. J. Ch. 144 ; 75 L. T. 475 ; 45 W. R. 123	108, 178
Paul, <i>Re</i> , 24 Q. B. D. 247 ; 59 L. J. Q. B. 30 ; 61 L. T. 835	507
Paul v. Meek, 2 Y. & J. 116	176
Paul v. Nurse, 8 B. & C. 486	392, 409
Paull v. Best, 3 B. & S. 537	300
Paull v. Simpson, 9 Q. B. 365 ; 15 L. J. Q. B. 382 ; 11 Jur. 13	420
Paxton v. Newton, 2 Sm. & Giff. 437	115
Payne v. Burridge, 12 M. & W. 727	368

	PAGE
Payne <i>v.</i> Haine, 16 M. & W. 541 ; 16 L. J. Ex. 130	314
Payne <i>v.</i> Rogers, 2 H. Bl. 349	311
Peacock <i>v.</i> Penson, 11 Beav. 355	115
Peacock <i>v.</i> Purvis, 2 Br. & B. 362	235
Peake's Settled Estates, <i>Re</i> , '93, 3 Ch. 430 ; 63 L. J. Ch. 109 ; 69 L. T. 281 ; 42 W. R. 125	52
Peakin <i>v.</i> Peakin, '95, 2 Ir. R. 359	520
Pearce <i>v.</i> Cheslyn, 4 A. & E. 225	80, 117
Pearce <i>v.</i> Gardner, '97, 1 Q. B. 688	106
Pearce <i>v.</i> Morrice, 3 B. & Ad. 396	176
Pearce <i>v.</i> Watts, 20 Eq. 492 ; 44 L. J. Ch. 492 ; 23 W. R. 771	138
Pearse <i>v.</i> Boulter, 2 F. & F. 133	446
Pearson <i>v.</i> Commissioners of Inland Revenue, L. R. 3 Ex. 242 ; 37 L. J. Ex. 171 ; 18 L. T. 570	172
Pearson <i>v.</i> Glazebrook, L. R. 3 Ex. 27 ; 37 L. J. Ex. 15 ; 17 L. T. 260	526
Pearson and P'Anson, <i>Re</i> , 68 L. J. Q. B. 878 ; 15 T. L. R. 452	505
Pearson <i>v.</i> Spencer, 1 B. & S. 571 ; 3 B. & S. 761 ; 8 L. T. 166 ; 11 W. R. 471	135
Pease <i>v.</i> Chaytor, 1 B. & S. 658 ; 3 <i>Ib.</i> 620 ; 32 L. J. M. C. 121 ; 9 Jur. N. S. 664 ; 8 L. T. 613 ; 11 W. R. 563	284
Pease <i>v.</i> Coates, 2 Eq. 688 ; 36 L. J. Ch. 57 ; 12 Jur. N. S. 684 ; 14 L. T. 886 ; 14 W. R. 1021	335
Peck and School Board for London, <i>Re</i> , '93, 2 Ch. 315 ; 62 L. J. Ch. 598 ; 68 L. T. 847 ; 41 W. R. 388	135
Pedley <i>v.</i> Dodds, 2 Eq. 819 ; 14 L. T. 823 ; 14 W. R. 884	128
Peebles <i>v.</i> Crosthwaite, 13 T. L. R. 198	394
Peed <i>v.</i> King, 11 T. L. R. 18	205
Peers <i>v.</i> Sneyd, 17 Beav. 157	71
Peirse <i>v.</i> Sharr, 2 Man. & Ry. 418	95, 384
Pellatt <i>v.</i> Boosey, 31 L. J. C. P. 281 ; 8 Jur. N. S. 1107	209, 468, 469
Pembroke <i>v.</i> Berkeley, Cro. Eliz. 384	463
Pembroke, Earl of <i>v.</i> Warren, '96, 1 Ir. R. 76	337
Penfold <i>v.</i> Abbot, 32 L. J. Q. B. 67 ; 9 Jur. N. S. 517 ; 7 L. T. 384 ; 11 W. R. 169	370
Penley <i>v.</i> Watts, 7 M. & W. 601	389
Pennant's Case, 3 Rep. 64 a	464, 468, 469
Penniall <i>v.</i> Harborne, 11 Q. B. 368 ; 17 L. J. Q. B. 94 ; 12 Jur. 159	358, 359
Pennington <i>v.</i> Cardale, 3 H. & N. 656 ; 27 L. J. Ex. 438	27
Fennington <i>v.</i> Crossley & Sons, Lim., 13 T. L. R. 513	215
Perry <i>v.</i> Brown, 2 Stark. 403	319, 495
Penton <i>v.</i> Barnett, '98, 1 Q. B. 276 ; 67 L. J. Q. B. 11 ; 77 L. T. 645 ; 46 W. R. 33	469
Penton <i>v.</i> Robart, 2 East, 88	485, 486, 492
Perrins, <i>Re</i> , Poyser <i>v.</i> Beyfus, '98, 2 Ch. 182 ; 67 L. J. Ch. 454 ; 78 L. T. 666 ; 46 W. R. 595	412
Perreau <i>v.</i> Bevan, 5 B. & C. 284	286
Perring <i>v.</i> Brook, 7 C. & P. 360	80
Perry <i>v.</i> Chotzner, 9 T. L. R. 488	314
Perry <i>v.</i> Davis, 3 C. B. N. S. 769	327, 468
Perry <i>v.</i> Shipway, 1 Giff. 1 ; 28 L. J. Ch. 660	91
Peter <i>v.</i> Kendal, 6 B. & C. 703	2, 459
Petre <i>v.</i> Ferraers, 61 L. J. Ch. 426 ; 65 L. T. 568	512
Petrie <i>v.</i> Daniel, 1 Smith, 199	500
Petty <i>v.</i> Evans, 2 Brown. & G. 40	65
Phelan <i>v.</i> Tedcastle, 15 L. R. Ir. 169	107
Phené <i>v.</i> Popplewell, 12 C. B. N. S. 334 ; 31 L. J. C. P. 235	455, 456
Pheysey <i>v.</i> Vicary, 16 M. & W. 484	133
Phillips <i>v.</i> Rees, 24 Q. B. D. 17 ; 59 L. J. Q. B. 1 ; 61 L. T. 713 ; 38 W. R. 53	282
Philips <i>v.</i> Beer, 4 Camp. 266	201
Phillips <i>v.</i> Smith, 14 M. & W. 589	324, 325

	PAGE
Phillips v. Alderton, 24 W. R. 8	109, 110
Phillips v. Berryman, 3 Dougl. 286 ; 1 Selw. N. P. 679	284
Phillips v. Bridge, L. R. 9 C. P. 48 ; 43 L. J. C. P. 13 ; 29 L. T. 692 ; 22 W. R. 237	168
Phillips v. Doyle, 32 Sol. Journ. 11	139
Phillips v. Edwards, 33 Beav. 440	109
Phillips v. Everard, 5 Sim. 102	116
Phillips v. Hartley, 3 C. & P. 121	79
Phillips v. Henson, 3 C. P. D. 26 ; 47 L. J. C. P. 273 ; 37 L. T. 432 ; 26 W. R. 214	242
Phillips v. Jones, 9 Sim. 519	208, 341
Phillips v. Low, '92, 1 Ch. 47 ; 61 L. J. Ch. 44 ; 65 L. T. 552	135
Phillips v. Miller, L. R. 10 C. P. 420 ; 44 L. J. C. P. 265 ; 32 L. T. 638 ; 23 W. R. 834	414
Phillips v. Pearce, 5 B. & C. 433 ; 8 D. & R. 43	35
Phillips v. Shervill, 6 Q. B. 944 ; 14 L. J. Q. B. 144	301
Phillips v. Whitsed, 2 E. & E. 804 ; 29 L. J. Q. B. 164 ; 6 Jur. N. S. 727 ; 2 L. T. 278 ; 8 W. R. 494	243, 271
Philpot v. Hoare, 2 Atk. 219	409
Philpot v. Lehain, 35 L. T. 855	305
Phipps v. Jackson, 56 L. J. Ch. 550 ; 35 W. R. 378	350
Phipps v. Sculthorpe, 1 B. & A. 50	75
Pierson v. Harvey, 1 T. L. R. 430	469
Piggott v. Birtles, 1 M. & W. 441	240, 261
Piggott v. Stratton, 1 D. F. & J. 33 ; 29 L. J. Ch. 1 ; 6 Jur. N. S. 129	461
Pigot's Case, 11 Rep. 26 b	180
Pigot v. Garnish, Cro. Eliz. 678, 734	9
Pike v. Eyre, 9 B. & C. 909	384, 460
Pilkington v. Dalton, Cro. Eliz. 575	193
Pilkington v. Hastings, Cro. Eliz. 813	272
Pilkington v. Shallar, 2 Vern. 374	401
Pilling's Trusts, <i>Re</i> , 26 C. D. 432 ; 53 L. J. Ch. 1052 ; 32 W. R. 853	62
Pilling v. Armitage, 12 Ves. 78	51, 109
Pilton, <i>Ex parte</i> , 1 B. & A. 369	530
Pincomb v. Thomas, Cro. Jac. 524	139
Pinero v. Judson, 6 Bing. 206	81, 98
Pinhorn v. Souster, 8 Ex. 763 ; 22 L. J. Ex. 266	83, 392, 432, 433
Pistor v. Cater, 9 M. & W. 315 ; 12 L. J. Ex. 129	65, 98
Pitcher v. Tovey, 4 Mod. 71 ; 1 Salk. 81	188, 409, 422
Pitman v. Woodbury, 3 Ex. 4	179
Pitt v. Shew, 4 B. & A. 206	230, 280
Pitt v. Smith, 3 Camp. 33	74
Pitt v. Snowden, 3 Atk. 750	226
Place v. Fagg, 4 M. & Ry. 277	484
Plant v. Bourne, '97, 2 Ch. 281 ; 66 L. J. Ch. 643 ; 76 L. T. 820 ; 46 W. R. 59	107
Plant v. James, 5 B. & Ad. 791 ; 4 A. & E. 749	133
Platt v. Sleep, Cro. Jac. 275	453
Pleasant v. Benson, 14 East, 234	445, 460
Plimmer v. Mayor, &c. of Wellington, 53 L. J. P. C. 105 ; 51 L. T. 475 ; 9 App. Cas. 699	110
Pluck v. Digges, 5 Bligh N. S. 31	387
Plumer v. Brisco, 11 Q. B. 46 ; 17 L. J. Q. B. 158	287
Plummer, <i>Ex parte</i> , 1 Atk. 103	298
Pochin v. Smith, 52 J. P. 4	378, 380
Pocock v. Eustace, 2 Camp. 181	202
Pocock v. Gilham, C. & E. 104	327
Polden v. Bastard, 7 B. & S. 130 ; L. R. 1 Q. B. 156 ; 35 L. J. Q. B. 92 ; 13 L. T. 441 ; 14 W. R. 198	133, 135
Pollen v. Brewer, 7 C. B. N. S. 371 ; 6 Jur. N. S. 509	91, 431, 579
Pollitt v. Forrest, 11 Q. B. 949 ; 16 L. J. Q. B. 424 ; 11 Jur. 1032	199, 221

	PAGE
Pollock <i>v.</i> Booth, Jr. R. 9 Eq. 229 ...	99
Pollock <i>v.</i> Stacy, 9 Q. B. 1033 ; 16 L. J. Q. B. 132 ; 11 Jur. 267 ...	387
Pomery <i>v.</i> Partington, 3 T. R. 665 ...	53
Pomfret <i>v.</i> Ricroft, 1 Wms. Saund. 557 (ed. 1871) ...	310
Ponsford <i>v.</i> Abbott, C. & E. 225 ...	95
Ponsford <i>v.</i> Walton, L. R. 3 C. P. 167 ...	179
Ponsonby <i>v.</i> Adams, 2 Bro. P. C. 431 ...	199
Pontifex <i>v.</i> Foord, 12 Q. B. D. 152 ; 53 L. J. Q. B. 321 ; 49 L. T. 808 ; 32 W. R. 316 ...	389
Pool <i>v.</i> Crawcour & Co., 1 T. L. R. 165 ...	260
Poole's Case, 1 Salk. 363 ...	485, 492, 493
Poole's Settlement, <i>Re</i> , 50 L. T. 585 ; 32 W. R. 956 ...	47
Poole <i>v.</i> Bentley, 12 East, 168 ...	80
Poole <i>v.</i> Longueville, 2 Saund. 290, n. (7) ...	238
Poole <i>v.</i> Warren, 8 A. & E. 582 ; 3 Jur. 23 ...	514
Poole, Mayor of <i>v.</i> Whitt, 15 M. & W. 571 ; 16 L. J. Ex. 229 ...	69, 211
Pooley Hall Colliery Co., <i>Re</i> , 18 W. R. 201 ...	38
Pope <i>v.</i> Biggs, 9 B. & C. 245 ...	68, 77, 196, 197
Portage <i>v.</i> Cole, 1 Wms. Saund. 319 b ; 548 (ed. 1871) ...	155
Porry <i>v.</i> Allen, Cro. Eliz. 173 ...	457
Porter <i>v.</i> Drew, 5 C. P. D. 143 ; 49 L. J. C. P. 482 ; 42 L. T. 151 ; 28 W. R. 672 ...	388, 487
Porter <i>v.</i> Shephard, 6 T. R. 665 ...	155, 156
Porter <i>v.</i> Swetnam, Styles, 406 ...	146
Portman <i>v.</i> Home Hospital Association, 27 C. D. 81, n. ; 50 L. T. 599, n. ...	334
Portman <i>v.</i> Mill, 3 Jur. 356 ...	130
Pertmore <i>v.</i> Goring, 4 Bing. 152 ...	183
Portuguese Mines, Lim., <i>Re</i> , 45 C. D. 16 ; 63 L. T. 423 ; 39 W. R. 25 ...	24
Postman <i>v.</i> Harrell, 6 C. & P. 225 ...	248, 291
Potter, <i>Re</i> , 18 Eq. 381 ; 43 L. J. Bk. 139 ; 30 L. T. 618 ; 22 W. R. 768 ...	229
Potter <i>v.</i> Bradley, 10 T. L. R. 445 ...	217
Potter <i>v.</i> Duffield, 18 Eq. 4 ; 43 L. J. Ch. 472 ; 22 W. R. 585 ...	107
Potter <i>v.</i> Peters, 64 L. J. Ch. 357 ; 72 L. T. 624 ...	105, 108
Potts <i>v.</i> Smith, 6 Eq. 311 ; 38 L. J. Ch. 58 ; 18 L. T. 629 ; 16 W. R. 891 ...	373
Poultney <i>v.</i> Holmes, 1 Str. 405 ...	191, 387
Powell, <i>Re</i> , W. N. (1884) 67 ...	4
Powell <i>v.</i> Chester, 52 L. T. 722 ...	331, 332
Powell <i>v.</i> Lovegrove, 8 D. M. & G. 357 ...	114
Powell <i>v.</i> Smith, 14 Eq. 85 ; 41 L. J. Ch. 734 ; 26 L. T. 754 ; 20 W. R. 602 ...	71, 114, 450
Powers, <i>Re</i> , 63 L. T. 626 ; 39 W. R. 185 ...	226, 500
Powis <i>v.</i> Lord Dynevor, 35 L. T. 940 ...	114
Powis <i>v.</i> Smith, 5 B. & A. 850 ...	197
Powley <i>v.</i> Walker, 5 T. R. 373 ...	345
Pownall <i>v.</i> Moores, 5 B. & A. 416 ...	350
Powys <i>v.</i> Blagrove, 4 D. M. & G. 448 ; 24 L. J. Ch. 142 ...	328
Poynter <i>v.</i> Buckley, 5 C. & P. 512 ...	277
Pratt <i>v.</i> Brett, 2 Madd. 62 ...	329
Pratt <i>v.</i> Keith, 33 L. J. Ch. 528 ; 10 Jur. N. S. 305 ; 10 L. T. 15 ; 12 W. R. 394 ...	200
Predymau <i>v.</i> Wodry, Cro. Jac. 109 ...	23
Preece <i>v.</i> Corrie, 5 Bing. 24 ...	191, 387
Prentice <i>v.</i> Elliott, 5 M. & W. 606 ...	209
Prescott <i>v.</i> Boucher, 3 B. & Ad. 849 ...	226
Preston <i>v.</i> Merceau, 2 W. Bl. 1249 ...	121
Pretty <i>v.</i> Bickmore, L. R. 8 C. P. 401 ; 28 L. T. 704 ; 21 W. R. 733 ...	311
Price, <i>Re</i> , 13 Q. B. D. 466 ; 33 W. R. 139 ...	424
Price <i>v.</i> Dyer, 17 Ves. 356 ...	450
Price <i>v.</i> Griffith, 1 D. M. & G. 80 ; 21 L. J. Ch. 78 ; 15 Jur. 1093 ...	114
Price <i>v.</i> Salusbury, 32 Beav. 446 ; 32 L. J. Ch. 441 ; 14 L. T. 110 ...	109
Price <i>v.</i> Thomas, 2 B. & Ad. 218 ...	174
Price <i>v.</i> Varney, 3 B. & C. 733 ...	70

	PAGE
Price v. Williams, 1 M. & W. 6; 5 L. J. Ex. 129	25, 183
Price v. Worwood, 4 H. & N. 512; 28 L. J. Ex. 329; 5 Jur. N. S. 472	358, 468, 469
Pride v. Bubb, 7 Ch. 64; 41 L. J. Ch. 105; 25 L. T. 890; 20 W. R. 220	...
Prince v. Evans, 29 L. T. 835	16
Proctor, <i>Re</i> , 8 Morr. 251	442
Proctor v. Bayley, 42 C. D. 390	426
Progress Assurance Co., <i>Re</i> , 9 Eq. 370; 39 L. J. Ch. 504; 22 L. T. 707	116
Propert v. Parker, 3 My. & K. 280	303
Propert v. Parker, 1 Russ. & M. 625	153
Prosser v. Phillips, Bull. N. P. 269	108, 112
Proud v. Bates, 34 L. J. Ch. 406; 11 Jur. N. S. 441; 12 L. T. 565; 13 L. T. 61	170
Proudfoot v. Hart, 25 Q. B. D. 42; 59 L. J. Q. B. 389; 63 L. T. 171; 38 W. R. 730	...
Pronldove v. Twemlow, 1 Cr. & M. 326	315
Pryce v. Davies, 35 J. P. 374	261, 281
Pugh v. Arton, 8 Eq. 626; 38 L. J. Ch. 619; 20 L. T. 865; 17 W. R. 984	380
Pugh v. Griffith, 7 A. & E. 827	491, 493
Pugh v. Leeds, Duke of, 2 Cowp. 714	259
Pugh v. Stringfield, 3 C. B. N. S. 2	142
Pulbrook v. Ashby, 56 L. J. Q. B. 376; 35 W. R. 779	156
Pulbrook v. Lawes, 1 Q. B. D. 284; 45 L. J. Q. B. 178; 34 L. T. 95	221
Pullen v. Palmer, 3 Salk. 207	113
Pulteney v. Shelton, 5 Ves. 147	228, 229
Punnett, <i>Ex parte</i> , 16 C. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129	445
Pursell and Deakin's Contract, <i>Re</i> , W. N. (1893) p. 152	224
Purvis v. Bayer, 9 Price, 488	112
Pyle, <i>Re</i> , '95, 1 Ch. 724; 64 L. J. Ch. 477; 72 L. T. 327; 43 W. R. 420	111, 398
Pyle v. Partridge, 15 M. & W. 20	160
Pym v. Blackburn, 3 Ves. 34	255
Pym v. Campbell, 6 E. & B. 370; 25 L. J. Q. B. 277	104, 313
Pyot v. St. John, Cro. Jac. 329	178
Quarrington v. Arthur, 10 M. & W. 335	316
Quartermaine v. Selby, 5 T. L. R. 223	...
Queen's College v. Hallett, 14 East, 489	342
Quilter v. Mapleson, 9 Q. B. D. 672; 52 L. J. Q. B. 44; 47 L. T. 561; 31 W. R. 75	437, 445
Quincy, <i>Ex parte</i> , 1 Atk. 477	326
Quinn v. Shields, 1r. R. 11 C. L. 254	474
R. v. Aylesbury, 9 Q. B. 261	491
R. v. Banbury, 1 A. & E. 136	137
R. v. Barelay, 8 Q. B. D. 486; 51 L. J. M. C. 47; 46 L. T. 335; 30 W. R. 472	...
R. v. Bedworth, 8 East, 387	362
R. v. Bissex, Sayer, 304	208
R. v. Bolton, 1 Q. B. 66; 10 L. J. M. C. 49	247
R. v. Brettel, 3 B. & Ad. 424	527
R. v. Castle Morton, 3 B. & A. 588	131
R. v. Chawton, 1 Q. B. 247; 10 L. J. M. C. 55; 5 Jur. 245	117
R. v. Cheshire, JJ. of, 5 B. & Ad. 439; 2 L. J. M. C. 95	144, 433
R. v. Cheshunt, Inhab. of, 1 B. & A. 473	247
R. v. Chipping Norton, 5 East, 239	87, 434
R. v. Clark, 2 Cowp. 610	23
R. v. Collett, R. & R. C. C. 498	267
	91

	PAGE
<i>R. v. Cotton, Parker</i> , 112	237, 279
<i>R. v. Davis</i> , 5 B. & Ad. 551	247
<i>R. v. Dunsford</i> , 2 A. & E. 568	131
<i>R. v. Dunstan</i> , 4 B. & C. 686	491
<i>R. v. Everist</i> , 10 Q. B. 178 ; 16 L. J. M. C. 87 ; 11 Jur. 515	189
<i>R. v. Great Glenn, Inhab. of</i> , 5 B. & Ad. 188	418
<i>R. v. Hale</i> , 9 A. & E. 339	65
<i>R. v. Haughley</i> , 4 B. & Ad. 650	250
<i>R. v. Herstmonceaux</i> , 7 B. & C. 551	95
<i>R. v. Hockworthy</i> , 7 A. & E. 492	120, 174
<i>R. v. Horndon-on-the-Hill</i> , 4 M. & S. 562	87
<i>R. v. Horsley, Inhab. of</i> , 8 East, 405	61
<i>R. v. Hull Dock Co.</i> , 3 B. & C. 516	364
<i>R. v. Jobling, R. & R. C. C.</i> 525	91
<i>R. v. Kelstern, Inhab. of</i> , 5 M. & S. 136	87
<i>R. v. Lee</i> , L. R. 1 Q. B. 241 ; 35 L. J. M. C. 105 ; 13 L. T. 704 ; 14 W. R. 311	483, 491
<i>R. v. Londonthorpe</i> , 6 T. R. 377	480
<i>R. v. Middlehurst</i> , 1 Burr. 399	247
<i>R. v. Middlesex, JJ. of</i> , 7 Dowl. 767	527
<i>R. v. Middlesex, Registrar of</i> , 15 Q. B. 976 ; 19 L. J. Q. B. 537 ; 14 Jur. 1001	181, 400
<i>R. v. Mitcham</i> , 1 Dowl. 226, n.	201
<i>R. v. Morgan, Cald.</i> 156	247
<i>R. v. Morrish</i> , 32 L. J. M. C. 245	85
<i>R. v. Nicholson</i> , 12 East, 330	2
<i>R. v. North Duffield</i> , 3 M. & S. 247	23
<i>R. v. Norwich Incorporation</i> , 30 L. T. 704	93, 191
<i>R. v. Oakley</i> , 10 East, 491	9
<i>R. v. Old Alresford</i> , 1 T. R. 358	130
<i>R. v. Osbourne</i> , 6 Price, 94	350
<i>R. v. Otley</i> , 1 B. & Ad. 161	480
<i>R. v. Paterson</i> , '95, 1 Q. B. 31 ; 64 L. J. Q. B. 20 ; 71 L. T. 671 ; 43 W. R. 127	204
<i>R. v. Pedley</i> , 1 A. & E. 822	311
<i>R. v. Pierce</i> , 2 Camp. 96	444
<i>R. v. Prideaux</i> , 10 East, 158... ..	96
<i>R. v. Rabbits</i> , 6 D. & Ry. 341	247
<i>R. v. Radnorshire, JJ. of</i> , 9 Dowl. 90	247
<i>R. v. Raines</i> , 1 E. & B. 855 ; 22 L. J. Q. B. 223... ..	285
<i>R. v. Richmond, Recorder of</i> , E. B. & E. 253	446
<i>R. v. St. Mary, Durham</i> , 4 T. R. 477	362
<i>R. v. Sewell</i> , 8 Q. B. 161 ; 15 L. J. Q. B. 49 ; 10 Jur. 48	531
<i>R. v. Sherrington</i> , 3 B. & Ad. 714	8
<i>R. v. Shropshire, JJ. of</i> , 6 Q. B. D. 669 ; 50 L. J. M. C. 72 ; 29 W. R. 567	247
<i>R. v. Sidgley</i> , 2 B. & Ad. 65	131
<i>R. v. Shawstone</i> , 18 Q. B. 388	446
<i>R. v. Southerby, Bunbury</i> , 5... ..	237
<i>R. v. Spurrell</i> , L. R. 1 Q. B. 72	87
<i>R. v. Sutton</i> , 3 A. & E. 597	9
<i>R. v. Thornton (Inhabitants of)</i> , 2 E. & E. 788 ; 29 L. J. M. C. 162	93
<i>R. v. Tolpuddle</i> , 4 T. R. 671... ..	378
<i>R. v. Topping, M'Clel. & Y.</i> 544	495
<i>R. v. Traill</i> , 12 A. & E. 761	531
<i>R. v. Westbrook</i> 10 Q. B. 178 ; 16 L. J. M. C. 87 ; 11 Jur. 515	189
<i>Raffety v. Schofield</i> , '97, 1 Ch. 937 ; 66 L. J. Ch. 448 ; 76 L. T. 648 ; 45 W. R. 460	161
<i>Railton v. Wood</i> , 15 App. Cas. 363 ; 59 L. J. P. C. 84 ; 63 L. T. 13	301
<i>Rames v. Machin, Noy</i> , 130	7
<i>Ramsay v. Blair</i> , 1 App. Cas. 701	131, 132, 140

	PAGE
Ramsbottom v. Mortley, 2 M. & S. 445	117
Ramsbottom v. Tunbridge, 2 M. & S. 434	117
Ramsden v. Dyson, L. R. 1 H. L. 129; 12 Jur. N. S. 506; 14 W. R. 926... ..	110
Rand v. Vaughan, 1 Bing. N. C. 767	249
Randall v. Lynch, 12 East, 179	148
Randall v. Stevens, 2 E. & B. 641; 23 L. J. Q. B. 68; 18 Jur. 128	520
Randle v. Lory, 6 A. & E. 218	143, 169
Rands v. Clark, 19 W. R. 48	515
Ranelagh v. Melton, 2 Dr. & Sm. 278; 34 L. J. Ch. 227; 10 Jur. N. S. 1141; 11 L. T. 409; 13 W. R. 150	161
Ranken v. Hunt, 10 R. 249	335
Rankin v. Lay, 2 D. F. & J. 65; 29 L. J. Ch. 734	347
Rapley v. Taylor, C. & E. 150	262
Rathbone, <i>Re</i> , 56 L. J. Q. B. 504; 57 L. T. 420; 35 W. R. 735	426
Rawlings v. Morgan, 18 C. B. N. S. 776; 34 L. J. C. P. 185; 11 Jur. N. S. 564; 12 L. T. 348; 13 W. R. 746	323
Rawlins' Estate, <i>Re</i> , 1 Eq. 286	50, 52
Rawlins v. Briggs, 3 C. P. D. 368; 47 L. J. C. P. 487; 27 W. R. 133	367
Rawlins v. Turner, 1 Ld. Raym. 736	119
Rawlinson v. Marriott, 16 L. T. 207	515, 517
Rawson v. Eicke, 7 A. & E. 451	79
Rawstorne v. Bentley, 4 Bro. C. C. 415	65
Ray's Settled Estate, <i>Re</i> , 25 C. D. 464; 53 L. J. Ch. 205; 50 L. T. 80; 32 W. R. 458	13
Raymond v. Fitch, 2 Cr. M. & R. 588	357, 418
Rayner v. Stone, 2 Eden, 128	350
Read v. Burley, Cro. Eliz. 549, 596	231, 234
Read v. Lawns, Dyer, 212 b	213
Readshaw v. Balders, 4 Taunt. 57	363
Reddell v. Stowey, 2 Moo. & R. 358	268
Reddin v. Jarman, 16 L. T. 449	110
Rede v. Farr, 6 M. & S. 121	464
Redpath v. Roberts, 3 Esp. 225	210, 456
Reece v. Strousberg, 54 L. T. 133	224
Reed v. Deere, 7 B. & C. 261	180
Reed v. Harvey, 5 Q. B. D. 184; 49 L. J. Q. B. 295; 42 L. T. 511; 28 W. R. 423	426, 427
Reed v. Thoyts, 6 M. & W. 410	296
Rees v. Davies, 4 C. B. N. S. 56	530
Rees v. King, Forrest, 19	168
Rees v. Perrot, 4 C. & P. 230	445
Reeve v. Berridge, 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 36 W. R. 517	398
Reeve v. Bird, 1 C. M. & R. 31	209, 458
Reeve v. Gibson, '91, 1 Q. B. 652; 60 L. J. Q. B. 451; 39 W. R. 420	291
Reeves v. Cattell, 24 W. R. 485	338
Reeves v. Gill, 1 Beav. 375	111
Regent United Service Stores, <i>Re</i> , 8 C. D. 616; 47 L. J. Ch. 677; 38 L. T. 493; 26 W. R. 579	302
Regnart v. Porter, 7 Bing. 451	91, 190, 220
Reid v. Parsons, 2 Chit. 247... ..	464
Reid v. Reid, 31 C. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 332	16
Reid v. Tenterden, 4 Tyr. 111	421
Renals v. Cowlshaw, 9 C. D. 125; 11 C. D. 866; 48 L. J. Ch. 830; 41 L. T. 116; 28 W. R. 9	408
Rendall v. Andreae, 61 L. J. Q. B. 630	420, 421
Rendell v. Roman, 9 T. L. R. 192	84, 219
Renner v. Tolley, 68 L. T. 815	66
Revell v. Hussey, 2 Ball & B. 280	390
Reynard v. Arnold, 10 Ch. 386; 23 W. R. 804	161

	PAGE
Reynel's Case, 9 Rep. 95 a	3
Reynolds v. Barford, 7 M. & Gr. 449; 13 L. J. C. P. 177; 8 Jur. 961 ...	293
Reynolds v. Moore, '98, 2 Ir. R. 641	137
Reynolds v. Waring, 1 Yo. 346	109
Rhodes v. Bullard, 7 East, 116	155
Rich v. Basterfield, 4 C. B. 783; 16 L. J. C. P. 273; 11 Jur. 696 ...	311
Rich v. Jackson, 4 Bro. C. C. 514	121
Rich v. Woolley, 7 Bing. 651	245, 269
Richards v. Bluck, 6 C. B. 437; 18 L. J. C. P. 15; 12 Jur. 963 ...	349
Richards v. Crawshaw, 8 T. L. R. 446	393
Richards v. Easto, 15 M. & W. 244	309
Richards v. North London Rail. Co., 20 W. R. 194	109
Richards v. Soley, 2 Mod. 80	125
Richardson, <i>Re</i> , 16 C. D. 613; 44 L. T. 282; 29 W. R. 899 ...	427
Richardson v. Chasen, 10 Q. B. 756	113
Richardson v. Evans, 3 Madd. 218	394
Richardson v. Gifford, 1 A. & E. 52... ..	94, 97, 119
Richardson v. Langridge, 4 Taunt. 128	90, 92, 95
Richardson v. Sydenham, 2 Vern. 447	415
Richmond, Justices of, <i>Re</i> , 10 T. L. R. 68... ..	530
Rickett v. Tullick, 6 C. & P. 66	434
Ricketts v. Weaver, 12 M. & W. 718; 13 L. J. Ex. 195	418
Riddell v. Durnford, 37 Sol. Journ. 267	161
Riddell v. Errington, 26 C. D. 220; 54 L. J. Ch. 293; 50 L. T. 584; 32 W. R. 680	19
Ridge, <i>Re</i> , 31 C. D. 504; 55 L. J. Ch. 265; 54 L. T. 549; 34 W. R. 159	48, 49
Ridgway v. Sneyd, Kay, 627	208
Ridgway v. Stafford, 6 Ex. 404; 20 L. J. Ex. 226	278
Ridgway v. Wharton, 3 D. M. & G. 677; 6 H. L. C. 238; 27 L. J. Ch. 46; 4 Jur. N. S. 173	71, 103, 105
Right v. Bawden, 3 East, 260	96
Right v. Beard, 13 East, 210	91
Right v. Cinthell, 5 East, 491	445
Right v. Darby, 1 T. R. 159	92, 144, 435, 437, 450
Right v. Thomas, 3 Burr. 1441	125
Rimmer v. Knowles, 22 W. R. 574	72
Ringer v. Cann, 3 M. & W. 343	403
Riseley v. Ryle, 10 M. & W. 101; 11 <i>Id.</i> 16; 12 L. J. Ex. 38, 322 ...	293, 294
River Swale Brick Works, <i>Re</i> , 52 L. J. Ch. 638; 48 L. T. 778; 32 W. R. 202	252
Roads v. Trumpington, L. R. 6 Q. B. 56	84
Roberts v. Karr, 1 Taunt. 495	129
Robbins v. James, 15 C. B. N. S. 221	311
Roberts v. Barker, 1 Cr. & M. 808	97, 346, 500
Roberts v. Brett, 11 H. L. C. 337	155
Roberts v. Davey, 4 B. & Ad. 664	464
Roberts v. Haines, 6 E. & B. 643	140
Roberts v. Hayward, 3 C. & P. 432	442
Roberts v. Holland, '93, 1 Q. B. 665; 62 L. J. Q. B. 621; 41 W. R. 494	157, 416
Roberts v. Jackson, Peake, Add. Cas. 36	240
Roberts v. Potts, '94, 1 Q. B. 213; 63 L. J. Q. B. 381; 69 L. T. 849; 42 W. R. 294	205
Roberts v. Tregaskis, 38 L. T. 176	145, 414
Robertson and Thorne, <i>Re</i> , 47 J. P. 566	367
Robins v. Cox, 1 Lev. 22	197
Robinson's Settled Estates, <i>Re</i> , 38 Sol. Journ. 325	19
Robinson v. Harman, 1 Ex. 850; 18 L. J. Ex. 202	113
Robinson v. Hofman, 4 Bing. 562	197, 228
Robinson v. Kilvert, 41 C. D. 88; 58 L. J. Ch. 392; 61 L. T. 60; 37 W. R. 545	369, 371, 373

	AGE
Robinson v. Learoyd, 7 M. & W. 48	516
Robinson v. Macdonnell, 5 M. & S. 228	173
Robinson v. Milne, 53 L. J. Ch. 1070	131, 139
Robinson v. Rosher, 1 Y. & C. C. C. 7	402
Robinson v. Waddington, 13 Q. B. 753 ; 18 L. J. Q. B. 250 ; 13 Jur. 537	276
Robson, <i>Re</i> , 45 C. D. 71 ; 59 L. J. Ch. 627 ; 63 L. T. 372 ; 38 W. R. 536	185
Robson v. Flight, 4 D. J. & S. 608 ; 34 L. J. Ch. 226	52
Robson v. Palace Chambers Co., 14 T. L. R. 56	373
Rock Portland Cement Co. v. Wilson, 52 L. J. Ch. 214 ; 48 L. T. 386 ; 31 W. R. 193	107, 116
Rocke v. Hills, 3 T. L. R. 298	275, 291
Rockingham v. Penrice, 1 P. Wms. 177 ; 1 Swanst. 345, n.	194
Roden v. Eyton, 6 C. B. 427 ; 18 L. J. C. P. 1 ; 12 Jur. 921	261, 275, 278
Rodger v. Harrison, '93, 1 Q. B. 161 ; 62 L. J. Q. B. 213 ; 68 L. T. 66 ; 41 W. R. 291	401
Rodgers v. Parker, 18 C. B. 112 ; 25 L. J. C. P. 220 ; 2 Jur. N. S. 496	279, 281, 291
Rodmel v. Eden, 1 F. & F. 542	71
Roe v. Charnock, Peake, N. P. C. 4	434
Roe v. Davis, 7 East, 363	176
Roe v. Doe, 6 Bing. 574	437
Roe v. Galliers, 2 T. R. 133	164
Roe v. Harrison, 2 T. R. 425	392, 393, 468
Roe v. Hayley, 12 East, 464	451
Roe v. Lees, 2 W. Bl. 1171	92
Roe v. Minshall, Bull. N. P. 96	469
Roe v. Painc, 2 Camp. 520	471
Roe v. Pierce, 2 Camp. 96	441
Roe v. Prideaux, 10 East, 158	54
Roe v. St. Dunstan in Kent, 4 B. & C. 686	491
Roe v. Sales, 1 M. & S. 297	385
Roe v. Siddons, 22 Q. B. D. 224 ; 60 L. T. 345 ; 37 W. R. 228	134
Roe v. Street, 2 A. & E. 329	445
Roe v. Sunnerset, 2 W. Bl. 692	61, 63
Roe v. Ward, 1 H. Bl. 97	51, 89, 94, 97, 98, 439
Roe v. Wilkinson, cited Co. Lit. 270 b, n. 228	434
Roe v. York, Archbishop of, 6 East, 86	27, 55, 455, 457, 460
Roffey v. Henderson, 17 Q. B. 574 ; 21 L. J. Q. B. 49 ; 16 Jur. 84	492, 493
Rogers v. Birkmire, Cas. temp. Hard. 245 ; 2 Str. 1040	243
Rogers v. Hosegood, 1899, 16 T. L. R. 20	408
Rogers v. Humphreys, 4 A. & E. 299	67, 196, 224, 225
Rogers v. Kingston Dock Co., 34 L. J. Ch. 165 ; 11 L. T. 42 ; 12 W. R. 1101 ; 13 W. R. 217	437
Rogers v. Pitcher, 6 Taunt. 202	78, 216
Rogers v. Rice, '92, 2 Ch. 170 ; 61 L. J. Ch. 573 ; 66 L. T. 640 ; 40 W. R. 489	474
Rolfe v. Peterson, 2 Bro. P. C. 436	199
Rollason v. Leon, 7 H. & N. 73 ; 31 L. J. Ex. 96 ; 7 Jur. N. S. 608	81, 119
Rolls v. Miller, 27 C. D. 71 ; 53 L. J. Ch. 682 ; 50 L. T. 597 ; 32 W. R. 806	334
Rolls v. Rock, 2 Selw. N. P. (13th edition) 1244	138
Rolph v. Crouch, L. R. 3 Ex. 44 ; 37 L. J. Ex. 8 ; 17 L. T. 249 ; 16 W. R. 252	377
Roper v. Bumford, 3 Taunt. 76	200
Roper v. Coombes, 6 B. & C. 534	111
Forke v. Errington, 7 H. L. C. 617	127
Ross v. Fedden, L. R. 7 Q. B. 661	310
Ross v. Worsop, 1 Bro. P. C. 281	163
Rosse (Earl of) v. Wainman, 14 M. & W. 859 ; 2 Ex. 800	131
Rossiter v. Miller, 3 App. Cas. 1124 ; 48 L. J. Ch. 10 ; 39 L. T. 173 ; 26 W. R. 865	102, 103, 107

	PAGE
Rothery v. Wood, 3 Camp. 24	295
Roundwood Colliery Co., <i>Re</i> , '97, 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324	244, 304
Roulston v. Clarke, 2 H. Bl. 563	221
Rousillon v. Rousillon, 14 C. D. 351	333
Rowbotham v. Wilson, 8 H. L. C. 348	132
Rowe v. Young, 2 Br. & B. 165	194
Rowles v. Mason, Brown. & G., Part II. 192	24
Rowley v. Adams, 4 My. & Cr. 534	422
Rowls v. Gells, Cowp. 451	364
Rubery v. Jervoise, 1 T. R. 229	163
Rubery v. Stevens, 4 B. & Ad. 241	419, 421
Russell, <i>Ex parte</i> , 18 W. R. 753	232
Russell, <i>Re</i> , 29 C. D. 254	223
Russell v. Rider, 6 C. & P. 416	259, 268
Russell v. Shoobred, 29 C. D. 254; 53 L. T. 365	411
Russell v. Stokes, 1 H. Bl. 562	416
Russell v. Watts, 10 App. Cas. 590; 55 L. J. Ch. 158; 53 L. T. 870; 34 W. R. 277	135
Rutherford v. Wilkie, 41 L. T. 435	527
Ruttledge v. Whelan, 10 L. R. Ir. 263	473
Ryall v. Rich, 10 East, 48	515, 517
Ryan v. Mutual Tontine, &c., Association, '93, 1 Ch. 116; 62 L. J. Ch. 252; 67 L. T. 820; 41 W. R. 146	88
Ryan v. Thompson, L. R. 3 C. P. 144; 37 L. J. C. P. 134; 17 L. T. 506; 16 W. R. 314	203, 207
Ryan v. Shilcock, 7 Ex. 72; 15 Jur. 1200; 21 L. J. Ex. 55	257
Ryley v. Hicks, 1 Str. 651	119
Rymer v. Mellroy, '97, 1 Ch. 528; 66 L. J. Ch. 336; 76 L. T. 115; 45 W. R. 411	93
Sabin, <i>Re</i> , W. N. 1885, p. 197	47
Sacheverel v. Froggatt, 1 Vent. 161; 2 Wms. Saund. 367 a	148
Sacker v. Chidley, 11 Jur. N. S. 654; 13 W. R. 690	218
Sadler, <i>Ex parte</i> , 19 C. D. 122; 51 L. J. Ch. 201; 30 W. R. 173	425
Saffyn's Case, 5 Rep. 123 b	186
Saint v. Pilley, L. R. 10 Ex. 137; 44 L. J. Ex. 33; 33 L. T. 93; 23 W. R. 753	461, 493
St. Albans (Bishop of) v. Battersby, 3 Q. B. D. 359; 47 L. J. Q. B. 571; 38 L. T. 685; 26 W. R. 679	336
St. Albans (Duke of) v. Ellis, 16 East, 352	149
St. Albans v. Shore, 1 H. Bl. 270	155
St. Cross v. De Walden, 6 T. R. 338	188
Sainter v. Ferguson, 1 Mac. & G. 286; 7 C. B. 727	113, 159
St. Germans (Earl of) v. Willan, 2 B. & C. 216	349
St. John's College v. Murcott, 7 T. R. 259	235
St. Saviour's, Southwark, v. Smith, 3 Burr. 1271; 1 W. Bl. 351	401
Salaman v. Glover, 20 Eq. 444; 44 L. J. Ch. 551; 32 L. T. 792; 23 W. R. 722	121
Salamon v. Sopwith, 35 L. T. 826	59
Sale v. Lambert, 18 Eq. 1; 43 L. J. Ch. 470; 22 W. R. 478	107
Sale v. Kitchingham, 10 Mod. 158	405
Salisbury's Case (Bishop of), 10 Rep. 58 b	25, 27
Salisbury, <i>Re</i> Marquis of, 2 C. D. 29; 45 L. J. Ch. 250; 34 L. T. 5; 23 W. R. 824	5
Salisbury v. Gladstone, 6 H. & N. 127	131
Salmon v. Matthews, 8 M. & W. 827	190, 213
Salmon v. Smith, 1 Wms. Saund. 206 (ed. 1871)	209
Salt, <i>Re</i> , '96, 1 Ch. 117; 65 L. J. Ch. 152; 73 L. T. 598; 44 W. R. 146	12, 13
Salter v. Grosvenor, 8 Mod. 303	82
Salter v. Metropolitan District Rail. Co., 9 Eq. 432	130
Saltoun v. Houstoun, 1 Bing. 433	149

	PAGE
Sampson v. Easterby, 9 B. & C. 505 ; 6 Bing. 644	406
Samuda v. Lawford, 4 Giff. 42	115
Sanders, <i>Re</i> , 54 L. J. Q. B. 331 ; 52 L. T. 516	254
Sanders v. Davis, 15 Q. B. D. 218 ; 54 L. J. Q. B. 576 ; 33 W. R. 655	488
Sanders v. Karnell, 1 F. & F. 356	97
Sanders v. Sanders, 19 C. D. 373 ; 51 L. J. Ch. 276 ; 45 L. T. 637 ; 30 W. R. 280	521, 523
Sanderson v. Berwick-on-Tweed (Mayor of), 13 Q. B. D. 547 ; 53 L. J. Q. B. 559 ; 51 L. T. 495 ; 33 W. R. 67	372, 373
Sanderson v. Graves, L. R. 10 Ex. 234 ; 44 L. J. Ex. 210 ; 33 L. T. 269 ; 23 W. R. 797	105
Sandford v. Clarke, 21 Q. B. D. 398 ; 57 L. J. Q. B. 507 ; 59 L. T. 226 ; 37 W. R. 28	93, 311
Sandill v. Franklin, L. R. 10 C. P. 377 ; 44 L. J. C. P. 216 ; 32 L. T. 309 ; 23 W. R. 473	142, 440
Sands to Thompson, 22 C. D. 614 ; 52 L. J. Ch. 406 ; 48 L. T. 210 ; 31 W. R. 397	520
Sandwell, <i>Re</i> , 14 Q. B. D. 960 ; 54 L. J. Q. B. 323 ; 52 L. T. 692 ; 33 W. R. 522	426
Saner v. Bilton, 7 C. D. 815 ; 47 L. J. Ch. 267 ; 38 L. T. 281 ; 26 W. R. 394	207, 314, 321, 324
Sangster v. Noy, 16 L. T. 157	434
Sanxster v. Foster, Cr. & Ph. 302	219
Sapsford v. Fletcher, 4 T. R. 511	205
Sarson v. Roberts, '95, 2 Q. B. 395 ; 65 L. J. Q. B. 37 ; 73 L. T. 174 ; 43 W. R. 690	332
Saunders' Case, 5 Rep. 12 a	325, 326
Saunders v. Merryweather, 3 H. & C. 902 ; 35 L. J. Ex. 115 ; 13 W. R. 814	70, 164
Saunders v. Musgrave, 6 B. & C. 524	293
Saunders v. Owen, 2 Salk. 467	120
Saunders v. Pawley, 2 T. L. R. 590	332
Saunders v. Pitfield, 58 L. T. 108	382
Saunders v. Wakefield, 4 B. & A. 595	106
Saunders v. Hanson, 3 C. & P. 314	202, 203
Saundeys v. Oliffe, Moo. 467...	133
Sauvage v. Dupuis, 3 Taunt. 410	440
Savery v. Enfield Local Board, '93, A. C. 218 ; 62 L. J. Ch. 674 ; 68 L. T. 722 ; 42 W. R. 33	184
Say v. Barwick, 1 V. & B. 195	6, 74
Say v. Smith, Plowden, 269	143
Sayers v. Collyer, 28 C. D. 103 ; 54 L. J. Ch. 1 ; 51 L. T. 723 ; 33 W. R. 91	116
Scales v. Lawrence, 2 F. & F. 289	312, 313, 321
Scallock v. Harston, 1 C. P. D. 106 ; 45 L. J. C. P. 125 ; 34 L. T. 130 ; 24 W. R. 431	198, 413
Schofield v. Hincks, 58 L. J. Q. B. 147 ; 60 L. T. 573 ; 37 W. R. 157	352, 425, 508
Schwartz v. Locket, 61 L. T. 719 ; 38 W. R. 142	370
Schwerdtfeger, <i>In the goods of</i> , 1 P. D. 424	60
Scobie v. Collins, '95, 1 Q. B. 375 ; 64 L. J. Q. B. 10 ; 71 L. T. 775	83, 433
Scot v. Scot, Cro. Eliz. 73	466
Scott v. Avery, 5 H. L. C. 811	156
Scott v. Brown & Co., 51 L. T. 746	473, 518
Scott v. Buckley, 16 L. T. 573	258
Scott v. Nixon, 2 Con. & L. 185	522
Scott v. Waithman, 3 Stark. 168	287
Seago v. Deane, 4 Bing. 459...	124
Seal, <i>Re</i> , '94, 1 Ch. 316 ; 63 L. J. Ch. 275 ; 70 L. T. 329	128
Sear v. House Property, &c., Society, 16 C. D. 387 ; 50 L. J. Ch. 77 ; 43 L. T. 531 ; 29 W. R. 192	394

	PAGE
Searle <i>v.</i> Cooke, 43 C. D. 519 ; 59 L. J. Ch. 259 ; 62 L. T. 211	354
Seaton <i>v.</i> Staniland, 4 Giff. 61	6, 187
Seaward <i>v.</i> Dennington, 44 W. R. 696	465
Seaward <i>v.</i> Drew, 67 L. J. Q. B. 322 ; 78 L. T. 19	446, 450
Seaward <i>v.</i> Paterson, 12 T. L. R. 525	338
Sebright's Settled Estate, <i>Re</i> , 33 C. D. 429 ; 56 L. J. Ch. 169 ; 55 L. T. 570 ; 35 W. R. 49	70
Seers <i>v.</i> Hind, 1 Ves. 294	392, 393
Selby <i>v.</i> Browne, 7 Q. B. 620 ; 14 L. J. Q. B. 307	209
Selby <i>v.</i> Greaves, L. R. 3 C. P. 594 ; 37 L. J. C. P. 251 ; 19 L. T. 186 ; 16 W. R. 1127	147, 190, 221
Selby <i>v.</i> Selby, 3 Mer. 2	108
Sells <i>v.</i> Hoare, 1 Bing. 401	261
Semayne's Case, 5 Rep. 91	257
Senior <i>v.</i> Armytage, Holt, N. P. 197	499, 500
Serle, <i>Re</i> , '98, 1 Ch. 652 ; 67 L. J. Ch. 344 ; 78 L. T. 384 ; 46 W. R. 440	314, 469, 473, 474
Servante <i>v.</i> James, 10 B. & C. 410	156
Seton <i>v.</i> Slade, 7 Ves. 265	108
Seven <i>v.</i> Mihill, 1 Ld. Ken. 370	236
Sevenoaks Ry. Co. <i>v.</i> London, Chatham and Dover Ry. Co., 11 C. D. 625 ; 48 L. J. Ch. 513 ; 40 L. T. 545 ; 27 W. R. 672	99
Sewell <i>v.</i> Angerstein, 18 L. T. 300	483
Shackell <i>v.</i> Chorlton, '95, 1 Ch. 378 ; 64 L. J. Ch. 353 ; 72 L. T. 188 ; 43 W. R. 394	303
Shadbolt <i>v.</i> Woodfall, 2 Coll. 30	418
Shannon <i>v.</i> Bradstreet, 1 Sch. & Lef. 52	55, 56
Shardlow <i>v.</i> Cotterell, 20 C. D. 90 ; 51 L. J. Ch. 353 ; 45 L. T. 572 ; 30 W. R. 143	167
Sharp <i>v.</i> Key, 8 M. & W. 379	417
Sharp <i>v.</i> Milligan, 22 Beav. 606	63
Sharp <i>v.</i> Milligan (No. 2), 23 Beav. 419	151, 152
Sharp <i>v.</i> St. Sauveur, 7 Ch. 343	22
Sharp <i>v.</i> Wright, 28 Beav. 150	343
Sharp <i>v.</i> Fowle, 12 Q. B. D. 385 ; 53 L. J. Q. B. 309 ; 50 L. T. 758 ; 32 W. R. 539	243, 273, 280
Shaw's Trusts, <i>Re</i> , 12 Eq. 124 ; 25 L. T. 22 ; 19 W. R. 1025	59
Shaw <i>v.</i> Coffin, 14 C. B. N. S. 372	463
Shaw <i>v.</i> Earl of Jersey, 4 C. P. D. 359 ; 48 L. J. Q. B. 308 ; 28 W. R. 142	219
Shaw <i>v.</i> Kay, 1 Ex. 412 ; 17 L. J. Ex. 17	143, 319
Shaw <i>v.</i> Keighron, Ir. R. 3 Eq. 574	522
Shaw <i>v.</i> Lomas, 59 L. T. 477	460
Shaw <i>v.</i> Shaw, Vern. & Scriv. 607	9
Shaw <i>v.</i> Stenton, 2 H. & N. 858 ; 27 L. J. Ex. 253	373
Shears <i>v.</i> Thimbleby and Son, 13 T. L. R. 451	107
Shecomb <i>v.</i> Hawkins, Cro. Jac. 318	55
Sheehy <i>v.</i> Muskerry, 1 H. L. C. 576	54
Sheffield Building Society <i>v.</i> Harrison, 15 Q. B. D. 358 ; 54 L. J. Q. B. 15 ; 51 L. T. 649 ; 33 W. R. 144	484
Sheffield Wagon Co. <i>v.</i> Stratton, 48 L. J. Q. B. 35 ; 40 L. T. 86 ; 27 W. R. 120	3, 426
Shepherd <i>v.</i> Walker, 20 Eq. 659 ; 44 L. J. Ch. 648 ; 33 L. T. 47 ; 23 W. R. 903	114
Shepherd <i>v.</i> Berger, '91, 1 Q. B. 597 ; 60 L. J. Q. B. 395 ; 64 L. T. 435 ; 39 W. R. 330	169
Shepherd <i>v.</i> Hoddsman, 18 Q. B. 316 ; 21 L. J. Q. B. 263	2
Sheppard <i>v.</i> Hongkong, &c., Banking Corporation, 20 W. R. 459	395
Shields <i>v.</i> Atkins, 3 Atk. 560	89
Shillibeer <i>v.</i> Jarvis, 8 D. M. & G. 79	110
Shilson, <i>Ex parte</i> , 20 Q. B. D. 343 ; 57 L. J. Q. B. 169 ; 58 L. T. 586 ; 36 W. R. 187	427
Shippey <i>v.</i> Derrison, 5 Esp. 190	105

	PAGE
Shipwick v. Blanchard, 6 T. R. 298...	289
Shirley v. Newman, 1 Esp. 266 ...	435, 449
Shopland v. Ryoler, Cro. Jac. 55 ...	384
Shore v. Wilson, 9 C. & F. 365 ...	122
Shrewsbury's Case (Countess of), 5 Rep. 13 b ...	328
Shrewsbury (Earl of) v. Garfield, 60 L. J. Q. B. 765 ; 65 L. T. 748 ...	527
Shrewsbury (Earl of) v. Gould, 2 B. & A. 487 ...	149
Shrubb v. Lee, 59 L. T. 376 ...	508
Shuttleworth, <i>Ex parte</i> , 1 D. & C. 223 ...	299
Sidebotham v. Holland, '95, 1 Q. B. 378 ; 64 L. J. Q. B. 200 ; 72 L. T. 62 ; 43 W. R. 228 ...	142, 437, 438, 441, 457
Silcock v. Farmer, 46 L. T. 404 ...	396
Silkstone and Dodworth Co., <i>Re</i> , 17 C. D. 158 ; 50 L. J. Ch. 444 ; 44 L. T. 405 ; 29 W. R. 484 ...	303, 304
Simkin v. Ashurst, 1 Cr. M. & R. 261 ; 4 Tyr. 781 ...	89, 92
Simmonds v. Heath, '94, 1 Q. B. 29 ; 63 L. J. Q. B. 214 ; 69 L. T. 841 ; 42 W. R. 112 ...	205
Simmons v. Norton, 7 Bing. 640 ...	326, 356
Simmmons v. Underwood, 76 L. T. 777 ...	439
Simons v. Farren, 1 Bing. N. C. 126, 272 ...	211, 336
Simpson v. Clayton, 4 Bing. N. C. 758 ; 2 Jur. 892 ...	112
Simpson v. Gutteridge, 1 Madd. 609 ...	61
Simpson v. Hartopp, Willes, 512 ...	230, 231, 234
Simpson v. Scottish Union Insurance Co., 1 Hem. & M. 618 ; 32 L. J. Ch. 329 ...	360
Simpson v. Titterell, Cro. Eliz. 242 ...	463
Sims v. Tuffs, 6 C. & P. 207 ...	281
Six Carpenters' Case, 8 Rep. 146 a ...	278
Skeate v. Beale, 11 A. & E. 983 ...	263
Skerry v. Preston, 2 Chit. 245 ...	215, 307
Skidmore v. Booth, 6 C. & P. 777 ...	255
Skinner, <i>Ex parte</i> , 2 Mer. 457 ...	40
Skinnners' Co. v. Knight, '91, 2 Q. B. 542 ; 60 L. J. Q. B. 629 ; 65 L. T. 240 ; 40 W. R. 57 ...	475
Skipworth v. Green, 8 Mod. 311 ...	199
Skull v. Glenister, 16 C. B. N. S. 81 ; 33 L. J. C. P. 185 ; 11 W. R. 368 ...	120, 133
Slack v. Crewe, 2 F. & F. 59 ...	71
Slack v. Sharpe, 8 A. & E. 366 ; 7 L. J. Q. B. 225 ; 2 Jur. 839 ...	213
Slater v. Stone, Cro. Jac. 645 ...	318
Slator v. Brady, 14 Ir. C. L. R. 61 ...	6, 7, 8
Slator v. Trimble, 14 Ir. C. L. R. 342 ...	6, 7, 8
Sleap v. Newman, 12 C. B. N. S. 116 ...	421
Slingsby's Case, 5 Rep. 18 a ...	156
Slipper v. Tottenham, &c., Ry. Co., 4 Eq. 112 ; 36 L. J. Ch. 841 ; 16 L. T. 446 ; 15 W. R. 861 ...	392
Sloper v. Saunders, 29 L. J. Ex. 275 ...	306
Smallman v. Aghorow, Cro. Jac. 417 ...	20
Smallman v. Pollard, 6 M. & Gr. 1001 ; 13 L. J. C. P. 116 ; 8 Jur. 246 ...	295
Smallwood v. Sheppards, '95, 2 Q. B. 627 ; 64 L. J. Q. B. 727 ; 73 L. T. 219 ; 44 W. R. 44 ...	104, 306
Smart v. Harding, 15 C. B. 652 ; 24 L. J. C. P. 76 ...	397
Smart v. Jones, 15 C. B. N. S. 717 ; 33 L. J. C. P. 154 ; 10 Jur. N. S. 678 ; 10 L. T. 271 ; 12 W. R. 430 ...	87
Smart v. Morton, 5 E. & B. 30 ...	140
Smith, <i>Re</i> , 25 Q. B. D. 536 ; 59 L. J. Q. B. 554 ; 63 L. T. 621 ; 38 W. R. 744 ...	427
Smith's Charity, <i>Re</i> , 26 Sol. Journ. 298 ...	39
Smith's Estate, <i>Re</i> , 35 C. D. 589 ...	19
Smith v. Acock, 28 Sol. Journ. 740 ...	502, 509
Smith v. Acock, 53 L. T. 230 ...	502
Smith v. Ashforth, 29 L. J. Ex. 259 ...	262, 265
Smith v. Barrett, 1 Sid. 161 ...	23

	PAGE
Smith v. Birmingham Gas Co., 1 A. & E. 526	255
Smith v. Blackmore, 1 T. L. R. 267	456
Smith v. Bowin, 1 Mod. 25	8
Smith v. Bowles, 2 Rol. Abr. 451	189
Smith v. Chance, 2 B. & A. 753	349
Smith v. Clark, 9 Dowl. 202	445
Smith v. Clegg, 27 L. J. Ex. 300	183
Smith v. Compton, 3 B. & Ad. 189	372
Smith v. Day, 2 M. & W. 684	185, 186, 223
Smith v. Eggington, L. R. 9 C. P. 145 ; 43 L. J. C. P. 140 ; 30 L. T. 521	68, 414
Smith v. Eldridge, 15 C. B. 236	306
Smith v. Enright, 63 L. J. Q. B. 220 ; 69 L. T. 724	284, 288
Smith v. Goodwin, 4 B. & Ad. 413	262, 272
Smith v. Gronow, '91, 2 Q. B. 394 ; 60 L. J. Q. B. 776 ; 65 L. T. 117 ; 40 W. R. 46	167
Smith and Hartogs, <i>Re</i> , 73 L. T. 221 ; 44 W. R. 79	300
Smith v. Henley, 1 Ph. 391	117
Smith v. Howell, 6 Ex. 730 ; 20 L. J. Ex. 377	412
Smith v. Humble, 15 C. B. 321	203, 365
Smith v. Hunt, 54 L. T. 422	382
Smith (or Coles) v. Lovell, 10 C. B. 6 ; 20 L. J. C. P. 37 ; 15 Jur. 250	460
Smith v. Low, 1 Atk. 489	8, 75, 76
Smith v. Maclure, 32 W. R. 459	487
Smith v. Malings, Cro. Jac. 160	212
Smith v. Mapleback, 1 T. R. 441	191, 387, 454, 460
Smith v. Marrable, 11 M. & W. 5 ; 12 L. J. Ex. 223 ; 7 Jur. 70	332
Smith v. Martin, 2 Wms. Saund. 400, (ed. 1871) 806	130
Smith v. Peat, 9 Ex. 161 ; 23 L. J. Ex. 84	322, 411, 412
Smith v. Porklington, 1 Cr. & J. 445	69
Smith v. Raleigh, 3 Camp. 513	210
Smith v. Render, 27 L. J. Ex. 83 ; 5 W. R. 875	481
Smith v. Ridgeway, L. R. 1 Ex. 331	133
Smith v. Roberts, 9 T. L. R. 77	456
Smith v. Robinson, '93, 2 Q. B. 53 ; 62 L. J. Q. B. 509 ; 69 L. T. 434 ; 41 W. R. 588	368
Smith v. Russell, 3 Taunt. 400	236, 293
Smith v. Ryan, 9 Ir. L. R. 235	199
Smith v. St. Michael, Cambridge, 3 E. & E. 383	84
Smith v. Seghill, L. R. 10 Q. B. 422 ; 44 L. J. M. C. 114 ; 32 L. T. 859 ; 23 W. R. 745	88, 91
Smith v. Torr, 3 F. & F. 505	260, 268
Smith v. Twoart, 2 M. & Gr. 841	306
Smith v. Walton, 8 Bing. 235	123
Smith v. Webster, 3 C. D. 49 ; 45 L. J. Ch. 528 ; 35 L. T. 44 ; 24 W. R. 894	108
Smith v. White, L. R. 1 Eq. 626 ; 35 L. J. Ch. 454 ; 14 L. T. 350 ; 14 W. R. 510	159, 330, 412
Smith v. Widlake, 3 C. P. D. 10 ; 47 L. J. Ch. 282 ; 26 W. R. 52	51, 95, 96
Smith v. Wilson, 3 B. & Ad. 728	122, 123
Smith v. Wright, 6 H. & N. 821 ; 30 L. J. Ex. 313	267
Smyth v. Carter, 18 Beav. 78	327
Smyth v. Nangle, 7 Cl. & F. 405	162
Snelgar v. Henston, Cro. Jac. 611	229
Snell v. Finch, 13 C. B. N. S. 651 ; 32 L. J. C. P. 117 ; 9 Jur. N. S. 333 ; 7 L. T. 747 ; 11 W. R. 341	224
Snell v. Snell, 4 B. & C. 741	357
Snow v. Boycott, '92, 3 Ch. 110 ; 61 L. J. Ch. 591 ; 65 L. T. 762 ; 40 W. R. 603	453
Solme v. Bullock, 3 Lev. 165	133
Somerset (Duke of) v. Fogwell, 5 B. & C. 875	2, 120

	PAGE
Sorsbie <i>v.</i> Park, 12 M. & W. 146 ; 13 L. J. Ex. 9	156
Soulsby <i>v.</i> Neving, 9 East, 310	515, 516
Souter <i>v.</i> Drake, 5 B. & Ad. 992	398
South Kensington Co-op. Stores, <i>Re</i> , 17 C. D. 161 ; 50 L. J. Ch. 446 ; 44 L. T. 471 ; 29 W. R. 662	214, 302, 303
Southall <i>v.</i> Leadbetter, 3 T. R. 458	360
Southampton Imperial Hotel Co., <i>Re</i> , Hunt's Claim, 20 W. R. 435	38
Southcote <i>v.</i> Hoare, 3 Taunt. 87	157
Southport Banking Co. <i>v.</i> Thompson, 37 C. D. 64 ; 57 L. J. Ch. 114 ; 58 L. T. 143 ; 36 W. R. 113	488
Southport Tramways Co. <i>v.</i> Gandy, '97, 2 Q. B. 66 ; 66 L. J. Q. B. 532 ; 76 L. T. 815 ; 45 W. R. 684	524
Southwell <i>v.</i> Scotter, 49 L. J. Q. B. 356	454, 460
Soward <i>v.</i> Leggatt, 7 C. & P. 613	312
Sparkes <i>v.</i> Smith, 2 Vern. 275	403
Sparrow's Estate, <i>Re</i> , 1892, 1 Ch. 412	5
Sparrow <i>v.</i> Cooper, Hay & J. 404	161
Sparrow <i>v.</i> Hawkes, 2 Esp. 505	449
Spencer's Case, 5 Rep. 16 a	2, 189, 378, 404, 406, 414
Spencer <i>v.</i> Bailey, 69 L. T. 179	408
Spencer <i>v.</i> Marriott, 1 B. & C. 457	374, 376, 388
Spencer <i>v.</i> Parry, 3 A. & E. 331	369
Spenser's Estates, <i>Re</i> , 37 L. J. Ch. 18	5
Spice <i>v.</i> Webb, 2 Jur. 943	259
Spicer <i>v.</i> Barnard, 28 L. J. M. C. 176	380
Spicer <i>v.</i> Martin, 14 App. Cas. 12 ; 58 L. J. Ch. 309 ; 60 L. T. 546 ; 37 W. R. 689	408
Spike <i>v.</i> Harding, 7 C. D. 871 ; 47 L. J. Ch. 323 ; 38 L. T. 285 ; 26 W. R. 420	354
Spragg <i>v.</i> Hammond, 2 Br. & B. 59	202
Spurling <i>v.</i> Bantoft, '91, 2 Q. B. 384 ; 60 L. J. Q. B. 745 ; 65 L. T. 584 ; 40 W. R. 157	375
Squier <i>v.</i> Mayer, 2 Eq. Cas. Abr. 430	490
Stafford <i>v.</i> Gardner, L. R. 7 C. P. 242 ; 25 L. T. 876 ; 20 W. R. 299	501
Stagg <i>v.</i> Wyatt, 1 Arn. 327 ; 2 Jur. 892	434
Staines <i>v.</i> Morris, 1 V. & B. 8	410, 411, 412
Stancliffe <i>v.</i> Clarke, 7 Ex. 439 ; 21 L. J. Ex. 129	340
Standen <i>v.</i> Christmas, 10 Q. B. 135 ; 16 L. J. Q. B. 265 ; 11 Jur. 694	309, 403, 414
Staniforth <i>v.</i> Fox, 7 Bing. 590	80
Stanhope <i>v.</i> Haworth, 3 T. L. R. 34	476
Stanley <i>v.</i> Agnew, 12 M. & W. 827 ; 13 L. J. Ex. 197	320
Stanley <i>v.</i> Dowdeswell, L. R. 10 C. P. 102 ; 23 W. R. 389	102
Stanley <i>v.</i> Hayes, 3 Q. B. 105 ; 11 L. J. Q. B. 176	374
Stanley <i>v.</i> Towgood, 3 Bing. N. C. 4	311, 312
Stanley <i>v.</i> Wharton, 9 Price, 301 ; 10 Price, 138	246, 249
Stanfeld <i>v.</i> Hellawell, 7 Ex. 373 ; 21 L. J. Ex. 148	286
Stansfield <i>v.</i> Hobson, 3 D. M. & G. 620	523
Stansfield <i>v.</i> Mayor of Portsmouth, 4 C. B. N. S. 120 ; 27 L. J. C. P. 124 ; 4 Jur. N. S. 440	493
Stapylton <i>v.</i> Clough, 2 E. & B. 933 ; 23 L. J. Q. B. 5 ; 18 Jur. 60	447
Statham <i>v.</i> Liverpool Docks Trustees, 3 Y. & J. 565	163
Staunton <i>v.</i> Powell, Ir. R. 1 C. L. 182	362
Staveley <i>v.</i> Allcock, 16 Q. B. 636 ; 20 L. J. Q. B. 320 ; 15 Jur. 628	228
Stedman <i>v.</i> Bates, 1 Salk. 390	228, 229
Steed <i>v.</i> Cragh, 9 Mod. 43	21
Steele <i>v.</i> Mart, 4 B. & C. 272	126, 142
Steele <i>v.</i> Midland Ry. Co., 1 Ch. 275	130
Steer <i>v.</i> Cowley, 14 C. B. N. S. 337	173
Steevens' Hospital <i>v.</i> Dyas, 15 Ir. Ch. Rep. 405	24
Steiglitz <i>v.</i> Egginton, Holt, N. P. 141	70

Stephens, <i>Ex parte</i> , 7 C. D. 127 ; 47 L. J. Bk. 22 ; 37 L. T. 613 ; 26 W. R. 136	425
Stephens v. Bridges, 6 Madd. 66	453
Stephens v. Hotham, 1 K. & J. 571 ; 24 L. J. Ch. 665	116, 420, 421
Stevens v. Copp, L. R. 4 Ex. 20 ; 38 L. J. Ex. 31 ; 19 L. T. 454 ; 17 W. R. 166	407, 414
Stevens v. Marston, 60 L. J. Q. B. 192 ; 64 L. T. 274 ; 30 W. R. 129...	221
Stevens v. Morson, 26 Sol. Journ. 25	123
Stevenson v. Lambard, 2 East, 575	212, 213, 402, 405
Stevenson v. Newnham, 13 C. B. 285 ; 22 L. J. C. P. 110	252
Stevenson v. Powell, 1 Bulstr. 182	374
Stevenson v. Wood, 5 Esp. 200	299
Stevinson's Case, 1 Leon. 324	149
Stiles v. Cowper, 3 Atk. 692...	43, 51, 57
Still v. Webb, 45 W. R. 170...	185
Stocker v. Planet Building Society, 27 W. R. 877	321
Stockton Iron Furnace Co., <i>Re</i> , 10 C. D. 335 ; 48 L. J. Ch. 417 ; 40 L. T. 19 ; 27 W. R. 433	83
Stokell v. Niven, 61 L. T. 18	106
Stokes v. Moore, 1 Cox, 219...	108
Stolworthy v. Powell, 55 L. J. Q. B. 228 ; 54 L. T. 795	527
Stone v. Evans, Peake, Add. Cas. 94	403
Stone v. Whiting, 2 Stark. 235	458
Storer v. Hunter, 3 B. & C. 368	496
Storey v. Robinson, 6 T. R. 138	234
Story v. Finnis, 6 Ex. 123 ; 20 L. J. Ex. 144	269
Story v. Johnson, 2 Y. & C. Ex. 586	8
Strangways, <i>Re</i> , 34 C. D. 423 ; 56 L. J. Ch. 195 ; 55 L. T. 714 ; 35 W. R. 83	48, 49
Stranks v. St. John, L. R. 2 C. P. 376 ; 36 L. J. C. P. 118 ; 16 L. T. 283 ; 15 W. R. 678	111
Strathmore (Earl of) v. Vane, 37 C. D. 128 ; 57 L. J. Ch. 455 ; 58 L. T. 309 ; 36 W. R. 393	421
Stratton v. Pettitt, 16 C. B. 420 ; 24 L. J. C. P. 182 ; 1 Jur. N. S. 662	124
Strelley v. Pearson, 15 C. D. 113 ; 49 L. J. Ch. 406 ; 43 L. T. 155 ; 28 W. R. 752...	150, 154, 208
Strickland v. Maxwell, 2 Cr. & M. 539	141, 180, 501
Strong v. Elliott, 12 Sol. Journ. 651	255, 272
Strong v. Stringer, 61 L. T. 470	469, 475
Stroud, <i>Re</i> , 8 C. B. 502 ; 16 L. J. C. P. 117	92, 122
Stuart v. Diplock, 43 C. D. 343 ; 59 L. J. Ch. 142 ; 62 L. T. 333 ; 38 W. R. 223...	335
Stubbs v. Parsons, 3 B. & A. 519	202
Stukeley v. Butler, Hob. 170	140
Sturgeon v. Wingfield, 15 M. & W. 224 ; 15 L. J. Ex. 212	75
Sturgess v. Farrington, 4 Taunt. 614	206
Styles v. Wardle, 4 B. & C. 908	142
Sucksmith v. Wilson, 4 F. & F. 1083	501, 502
Suffield and Watts, <i>Re</i> , 20 Q. B. D. 693 ; 58 L. T. 911 ; 36 W. R. 584	218, 298
Sullivan v. Bishop, 2 C. & P. 359	517
Sumner v. Bromilow, 34 L. J. Q. B. 130 ; 11 Jur. N. S. 481	493, 496
Sumpter v. Cooper, 2 B. & Ad. 223...	400
Sunderland v. Newton, 3 Sim. 450	495
Sucombe v. Pinniger, 3 D. M. & G. 571	110
Surplice v. Farnsworth, 7 M. & Gr. 576 ; 13 L. J. C. P. 215 ; 8 Jur. 760	209, 450
Sury v. Brown, Latch. 99	2, 120
Sussex v. Wroth, Cro. Eliz. 5	55
Sutcliffe v. Wardle, 63 L. T. 329	161
Sutherland v. Briggs, 1 Hare, 26	110

	PAGE
Sutherland (Duke of) <i>v.</i> Heatheote, '92, 1 Ch. 475 ; 61 L. J. Ch. 248 ; 66 L. T. 210 85, 140, 187	
Sutherland <i>v.</i> Sutherland, 1893, 3 Ch. 169 ; 62 L. J. Ch. 946 ; 69 L. T. 186 ; 42 W. R. 12 44, 45	
Sutton, <i>Re</i> , 32 L. J. Ch. 437 ; 9 Jur. N. S. 456 ; 8 L. T. 343 ; 11 W. R. 413 218, 236	
Sutton's Case, 12 Mod. 557 51	
Sutton <i>v.</i> Baillie, 65 L. T. 528 377	
Sutton <i>v.</i> Temple, 12 M. & W. 52 ; 13 L. J. Ex. 17 ; 7 Jur. 1065 208, 332, 333	
Swadling <i>v.</i> Piers, Cro. Jac. 613 120	
Swain <i>v.</i> Ayres, 21 Q. B. D. 289 ; 57 L. J. Q. B. 428 ; 36 W. R. 798 82, 475	
Swaine <i>v.</i> Holman, Hob. 204 21	
Swann <i>v.</i> Falmouth, 8 B. & C. 436 259, 260, 268	
Swansea Bank <i>v.</i> Thomas, 4 Ex. D. 94 ; 48 L. J. Q. B. 344 ; 40 L. T. 558 ; 27 W. R. 491 214	
Swansea (Mayor of) <i>v.</i> Thomas, 10 Q. B. D. 48 ; 52 L. J. Q. B. 340 ; 47 L. T. 657 ; 31 W. R. 506 213	
Swatman <i>v.</i> Ambler, 8 Ex. 72 179	
Swatman <i>v.</i> Ambler, 24 L. J. Ex. 185 201	
Swayne <i>v.</i> Commissioners of Inland Revenue, '99, 1 Q. B. 335 ; 68 L. J. Q. B. 234 ; 80 L. T. 56 ; 47 W. R. 300 399	
Sweeney <i>v.</i> Sweeney, Ir. R. 10 C. L. 375 445	
Sweet <i>v.</i> Seager, 2 C. B. N. S. 119 ; 3 Jur. N. S. 588 367	
Sweeting <i>v.</i> Turner, L. R. 7 Q. B. 310 ; 41 L. J. Q. B. 58 ; 25 L. T. 796 ; 20 W. R. 185 218	
Swinburne <i>v.</i> Milburn, 9 App. Cas. 844 ; 54 L. J. Q. B. 6 ; 52 L. T. 222 ; 33 W. R. 325 162	
Swinfen <i>v.</i> Bacon, 6 H. & N. 184, 846 ; 30 L. J. Ex. 33, 368 ; 6 Jur. N. S. 1257 ; 7 <i>Ibid.</i> 897 ; 3 L. T. 440 ; 5 <i>Ibid.</i> 83 ; 9 W. R. 105, 740 515	
Swire <i>v.</i> Leach, 18 C. B. N. S. 479 ; 34 L. J. C. P. 150 ; 11 Jur. N. S. 179 ; 11 L. T. 680 ; 13 W. R. 385 231, 289	
Sym's Case, Cro. Eliz. 33 21	
Syme <i>v.</i> Harvey, 24 Sess. Cas. 2nd series, 202 486	
Syllivan <i>v.</i> Stradling, 2 Wils. 208 76	
Tabor <i>v.</i> Godfrey, 64 L. J. Q. B. 245 514	
Tadman <i>v.</i> Henman, '93, 2 Q. B. 168 76	
Taite <i>v.</i> Gosling, 11 C. D. 273 ; 48 L. J. Ch. 397 ; 40 L. T. 251 ; 27 W. R. 394 417	
Talbot <i>v.</i> Shrewsbury (Earl of), 16 Eq. 26 ; 42 L. J. Ch. 877 ; 21 W. R. 473 215	
Tamplin <i>v.</i> James, 15 C. D. 215 116	
Tancred <i>v.</i> Christy, 12 M. & W. 316 513	
Tancred <i>v.</i> Leyland, 16 Q. B. 669 ; 20 L. J. Q. B. 316 ; 15 Jur. 394 .. 252	
Tanham <i>v.</i> Nicholson, L. R. 5 H. L. 561 446	
Tanner <i>v.</i> Christian, 4 E. & B. 591 72	
Tapling <i>v.</i> Weston, C. & E. 99 231	
Tarn <i>v.</i> Turner, 39 C. D. 456 ; 57 L. J. Ch. 1085 ; 59 L. T. 742 ; 37 W. R. 276 68	
Tarte <i>v.</i> Darby, 15 M. & W. 601 ; 15 L. J. Ex. 326 80, 459	
Tasker <i>v.</i> Bullman, 3 Ex. 351 207	
Tassell <i>v.</i> Hallen, '92, 1 Q. B. 321 ; 61 L. J. Q. B. 159 ; 66 L. T. 196 ; 40 W. R. 221 323	
Tate <i>v.</i> Glead, 2 Wms. Saund. (ed. 1871) 675, n. (x) 233	
Tatem <i>v.</i> Chaplin, 2 H. Bl. 133 405	
Taunton <i>v.</i> Costar, 7 T. R. 431 518, 519	
Taunton <i>v.</i> Pepler, 6 Mod. 166 178	
Taws <i>v.</i> Knowles, '91, 2 Q. B. 564 ; 60 L. J. Q. B. 641 ; 65 L. T. 124 ; 39 W. R. 675 135	

	PAGE
Taylorson v. Peters, 7 A. & E. 110; 1 Jur. 497	251
Taylor v. Wildin, L. R. 3 Ex. 303; 37 L. J. Ex. 173; 18 L. T. 655; 16 W. R. 1018	448
Taylor, <i>Ex parte</i> , 8 D. M. & G. 254	11
Taylor, <i>Re</i> , 31 W. R. 596	13
Taylor v. Caldwell, 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. 356; 11 W. R. 726	84, 85, 158
Taylor v. Chapman, Peake, Add. Cas. 19	458
Taylor v. Horde, 1 Burr. 60	52, 151
Taylor v. Jackson, 2 C. & K. 22	79
Taylor v. Lanyon, 6 Bing. 536	292
Taylor v. Meads, 34 L. J. Ch. 203; 4 De G. J. & S. 597... ..	16
Taylor v. Needham, 2 Taunt. 278	76
Taylor v. Portington, 7 D. M. & G. 328	115
Taylor v. Shum, 1 B. & P. 21	409, 422
Taylor v. Taylor, 20 Eq. 297; 33 L. T. 89; 23 W. R. 947	50
Taylor v. Zamira, 6 Taunt. 524	206
Tempest v. Rawling, 13 East, 18	79
Temple v. Brown, 6 Taunt. 60	111
Templeman v. Case, 10 Mod. 24	284
Tennant v. Field, 8 E. & B. 336; 27 L. J. Q. B. 33; 3 Jur. N. S. 1178	259, 260, 265, 272, 273
Tew v. Jones, 13 M. & W. 12; 14 L. J. Ex. 94	91
Theed v. Starkey, 8 Mod. 314	364
Thetford (Mayor of) v. Tyler, 8 Q. B. 95; 15 L. J. Q. B. 33; 10 Jur. 68	96, 306
Thomas, <i>Re</i> , 21 Q. B. D. 380; 57 L. J. Q. B. 574; 59 L. T. 447; 36 W. R. 735	424
Thomas v. Cadwallader, Willes, 496	318
Thomas v. Cook, 2 B. & A. 119	458
Thomas v. Fredericks, 10 Q. B. 775; 16 L. J. Q. B. 393	121
Thomas v. Harries, 1 Sc. N. R. 524; 1 M. & Gr. 695; 9 L. J. C. P. 308; 4 Jur. 723	259, 266, 273
Thomas v. Hayward, L. R. 4 Ex. 311; 38 L. J. Ex. 175; 20 L. T. 814	406, 407
Thomas v. Jennings, 66 L. J. Q. B. 5; 75 L. T. 274; 45 W. R. 93	488, 494
Thomas v. Lulham, '95, 2 Q. B. 400; 64 L. J. Q. B. 720; 73 L. T. 146; 43 W. R. 689	470
Thomas v. Mirehouse, 19 Q. B. D. 563; 56 L. J. Q. B. 653; 36 W. R. 104	294, 295
Thomas v. Owen, 20 Q. B. D. 225; 57 L. J. Q. B. 198; 58 L. T. 162; 36 W. R. 440	134, 135
Thomas v. Packer, 1 H. & N. 669; 26 L. J. Ex. 207; 3 Jur. N. S. 143	98
Thomas v. Patent Lionite Co., 17 C. D. 250; 50 L. J. Ch. 544; 44 L. T. 392; 29 W. R. 596	302
Thomas v. Sorrel, Vaughan, 351	86
Thomas v. Thomas, 2 Camp. 647	439
Thompson v. Guyon, 5 Sim. 65	163
Thompson v. Hakewill, 19 C. B. N. S. 713; 35 L. J. C. P. 18; 11 Jur. N. S. 732; 13 L. T. 989; 14 W. R. 11	64, 157
Thompson v. Lapworth, L. R. 3 C. P. 149; 37 L. J. C. P. 74; 17 L. T. 507; 16 W. R. 312	366, 367
Thompson v. Maberley, 2 Camp. 573	433
Thompson & M'Williams' Contract, <i>Re</i> , 1896, 1 Ir. R. 356	60
Thompson v. Mashiter, 1 Bing. 283	231
Thompson v. Pettitt, 10 Q. B. 101; 16 L. J. Q. B. 162; 11 Jur. 748... ..	494
Thompson v. Wood, 4 Q. B. 493; 12 L. J. Q. B. 175; 7 Jur. 303	261
Thomson v. Davenport, 9 B. & C. 78	72
Thomson v. Wilson, 2 Stark. 379	455
Thorn v. Woolleombe, 3 B. & Ad. 586	387
Thorne v. Thorne, '93, 3 Ch. 196; 63 L. J. Ch. 38; 69 L. T. 378; 42 W. R. 282... ..	419

	PAGE
Thorne's S. E., <i>Re</i> , 20 W. R. 587	19
Thornewell v. Johnson, 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 677	409
Thornton v. Adams, 5 M. & S. 38	248
Thornton v. Sherratt, 8 Taunt. 529	339, 340
Thoroughgood's Case, 9 Rep. 136 a	178
Thorp v. Hunt, '86, W. N. 96	168
Thorpe v. Brumfitt, 8 Ch. 650	133
Thorpe v. Eyre, 1 A. & E. 926	501
Thorpe v. Hurt, '86, W. N. 96	244
Thorpe v. Milligan, 5 W. R. 336	494
Threlfall, <i>Re</i> , 16 C. D. 274; 50 L. J. Ch. 318; 44 L. T. 74; 29 W. R. 128	83, 93, 436
Thresher v. E. London Waterworks, 2 B. & C. 608	316, 485, 496
Throgmorton v. Whelpdale, Bull. N. P. 96	449
Thrustout v. Coppin, 2 W. Bl. 801	21
Thunder v. Belcher, 3 East, 449	68, 384
Thurgood v. Richardson, 7 Bing. 428	292
Thwaites v. Wilding, 12 Q. B. D. 4; 53 L. J. Q. B. 1; 49 L. T. 396; 32 W. R. 80	243, 263
Thynne v. Glengall, 2 H. L. C. 131	109, 114
Tichborne v. Weir, 67 L. T. 735	403
Tickle, <i>Re</i> , 3 Morr. 126	464
Tidey v. Mollett, 16 C. B. N. S. 298; 33 L. J. C. P. 235; 10 Jur. N. S. 800; 10 L. T. 380	119
Tidswell v. Whitworth, L. R. 2 C. P. 326; 39 L. J. C. P. 103; 15 L. T. 574; 15 W. R. 427	129, 203, 367
Tildesley v. Clarkson, 30 Beav. 419; 31 L. J. Ch. 362; 8 Jur. N. S. 163; 6 L. T. 98; 10 W. R. 328	115
Till, <i>Ex parte</i> , 16 Eq. 97; 42 L. J. Bk. 84; 21 W. R. 574	236, 298
Tilney v. Norris, 1 Ld. Raym. 553	420
Timmins v. Rowlison, 1 W. Bl. 533; 3 Burr. 1603	516, 517
Timms v. Baker, 49 L. T. 106	166, 385
Tinckler v. Prentice, 4 Taunt. 549	201, 363
Tingrey v. Brown, 1 B. & P. 310	516
Tisdale v. Essex, Hob. 34	125, 371
Titterton v. Cooper, 9 Q. B. D. 473; 51 L. J. Q. B. 472; 46 L. T. 870; 30 W. R. 866	423
Todd v. Flight, 9 C. B. N. S. 377; 30 L. J. C. P. 21; 3 L. T. 325; 9 W. R. 145	311
Tod-Heatly v. Benham, 40 C. D. 80; 58 L. J. Ch. 83; 60 L. T. 241; 37 W. R. 38	337
Tofield v. Roberts, 10 T. L. R. 437	110
Toleman v. Portbury, L. R. 5 Q. B. 288; 7 Q. B. 344; 39 L. J. Q. B. 136; 22 L. T. 33; 18 W. R. 579	338
Toleman v. Portbury, L. R. 6 Q. B. 245; 41 L. J. Q. B. 98; 26 L. T. 292; 20 W. R. 441	464, 468
Toler v. Slater, L. R. 3 Q. B. 42; 37 L. J. Q. B. 33; 17 L. T. 168; 16 W. R. 124	20, 179
Tollet v. Tollet, 2 P. Wms. 489	56
Tolson v. Sheard, 5 C. D. 19; 36 L. T. 756; 25 W. R. 667	59
Tomkins v. Lawrance, 8 C. & P. 729	93
Tomkins v. Pinsent, 2 Ld. Raym. 819	147, 192
Tomlinson, <i>Re</i> , '98, 1 Ch. 232; 67 L. J. Ch. 97; 78 L. T. 12; 46 W. R. 299	328
Tomlinson v. Consol. Credit Corp., 24 Q. B. D. 135; 62 L. T. 162; 38 W. R. 118	248
Tomlinson v. Day, 2 Br. & B. 680	209, 212, 366
Toms v. Luckett, 5 C. B. 23	242
Tooker v. Smith, 1 H. & N. 732	98, 440
Toplis v. Grane, 5 Bing. N. C. 636; 9 L. J. C. P. 180	256
Torriano v. Young, 6 C. & P. 8	308, 323

	PAGE
Touhuin v. Millar, 58 L. T. 96	72
Towerson v. Jackson, '91, 2 Q. B. 484; 61 L. J. Q. B. 36; 65 L. T. 332; 40 W. R. 37	68
Towne v. Campbell, 3 C. B. 921; 16 L. J. C. P. 128	436
Towne v. D'Heinriche, 13 C. B. 892; 22 L. J. C. P. 219; 17 Jur. 1102	187, 306
Townley v. Bedwell, 14 Ves. 591	160
Townrow v. Benson, 3 Madd. 203	200
Trader's N. Staff. Co., <i>Re</i> , 19 Eq. 60; 44 L. J. Ch. 172; 31 L. T. 716; 23 W. R. 205	302
Trapper v. Hart, 2 Cr. & M. 153; 3 L. J. Ex. 24	486
Travel's Case, Lady, 3 Atk. 711	15
Travers v. Mason, 45 W. R. 77	437
Treackle v. Coke, 4 Vern. 164	409
Treemeere v. Morison, 1 Bing. N. C. 89	421
Treloar v. Bigge, L. R. 9 Ex. 151; 43 L. J. Ex. 95; 22 W. R. 843	394, 395
Trent v. Hunt, 9 Ex. 14; 22 L. J. Ex. 318; 17 Jur. 899	196, 224, 271, 272, 284
Treport's Case, 6 Rep. 14 b	77
Tress v. Savage, 4 E. & B. 36; 23 L. J. Q. B. 339; 18 Jur. 680	94, 440
Trevivan v. Lawrance, 1 Salk. 276	76
Trevilian v. Pyne, 11 Mod. 112	275
Triquet v. Bath, 3 Burr. 1478	239
Tritton v. Bankart, 56 L. J. Ch. 629; 56 L. T. 306; 35 W. R. 474	334, 344, 388
Tritton v. Foote, 2 Bro. C. C. 636	162
Trotman v. Flesher, 3 Giff. 1	109
Trneman v. Loder, 11 A. & E. 589	195
Truempenny's Case, cited Cro. Eliz. 269	143
Truscott v. Diamond Rock Boring Co., 20 C. D. 251; 51 L. J. Ch. 259; 46 L. T. 7; 30 W. R. 277	47, 54, 312
Tabbs v. Wynne, '97, 1 Q. B. 74; 66 L. J. Q. B. 116	368
Tucker v. Linger, 21 C. D. 18; 8 App. Cas. 508; 52 L. J. Ch. 941; 49 L. T. 373; 32 W. R. 40	131, 132, 139, 318, 327, 346, 347
Tudgay v. Sampson, 30 L. T. 262	2, 378
Tulk v. Moxhay, 2 Ph. 774	404, 407
Tummons v. Ogle, 6 E. & B. 571; 25 L. J. Q. B. 403	287
Tunnicliffe v. Wilmot, 2 C. & K. 626	286
Turner v. Allday, Tyr. & Gr. 819	147, 191, 192
Turner v. Barnes, 2 B. & S. 435; 31 L. J. Q. B. 170; 9 Jur. N. S. 199; 10 W. R. 561	83, 251, 433
Turner v. Bennett, 9 M. & W. 643	520
Turner v. Cameron, L. R. 5 Q. B. 306; 39 L. J. Q. B. 125; 22 L. T. 525; 18 W. R. 544	479, 480, 481
Turner v. Cameron's, &c., Co., 5 Ex. 932; 20 L. J. Ex. 71	187
Turner v. Ford, 15 M. & W. 212; 15 L. J. Ex. 215	268, 279
Turner v. Hardey, 9 M. & W. 770	459
Turner v. Hutchinson, 2 F. & F. 185	71
Turner v. Lamb, 14 M. & W. 412	322
Turner v. Meymott, 1 Bing. 158	518
Turner v. Power, 7 B. & C. 625	116, 117, 175
Turney v. Sturges, Dyer, 91 a	20
Tutton v. Darke, 5 H. & N. 647; 29 L. J. Ex. 271; 6 Jur. N. S. 983; 2 L. T. 361	251, 252
Twiss v. Noblet, Ir. R. 4 Eq. 64	522
Twynnam v. Pickard, 2 B. & A. 105	417
Tyley v. Seed, Skin. 649	434
Tyson v. Smith, 9 A. & E. 406	346
Underhay v. Read, 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298	68, 69, 197, 206

	PAGE
Underwood v. Burrows, 7 C. & P. 26	88
United Club, <i>Re</i> , 60 L. T. 665	214
Upton v. Ferguson, 3 Moo. & Sc. 88	370
Vale & Sons v. Moorgate Street, &c., Buildings (Lim.), 80 L. T. 487	337
Upton v. Townend, Upton v. Greenlees, 17 C. B. 30 ; 25 L. J. C. P. 44 ; 1 Jur. N. S. 1089	209, 210
Vale of Neath Colliery Co. v. Furness, 45 L. J. Ch. 276 ; 34 L. T. 231 ; 24 W. R. 631	102
Valentine v. Canali, 24 Q. B. D. 166 ; 59 L. J. Q. B. 74 ; 61 L. T. 731 ; 38 W. R. 331	11
Valiant v. Dodemede, 2 Atk. 546	409
Van v. Corpe, 3 My. & K. 269	153, 388
Vance v. Vance, Ir. R. 5 C. L. 363... ..	448
Varley v. Coppard, L. R. 7 C. P. 505 ; 26 L. T. 882 ; 20 W. R. 972	393
Vasper v. Eddows, 1 Salk. 248	268
Vaughan, <i>Ex parte</i> , L. R. 2 Q. B. 114 ; 36 L. J. M. C. 17 ; 15 W. R. 198	527
Vaughan v. Davies, 1 Esp. 257	291
Vaughan v. Hancock, 3 C. B. 766 ; 16 L. J. C. P. 1	104
Veale v. Warner, 1 Wms. Saund. 575 (ed. 1871)	75
Venning v. Bray, 2 B. & S. 502 ; 31 L. J. Q. B. 181 ; 8 Jur. N. S. 1039 ; 6 L. T. 327 ; 10 W. R. 56	196
Verlander v. Codd, T. & R. 352	107
Vernon v. Smith, 5 B. & A. 1	360, 405
Vertue v. Beasley, 1 Moo. & Rob. 21	272, 273
Vigers v. Dean and Chapter of St. Paul's, 14 Q. B. 909, 920 ; 18 L. J. Q. B. 97 ; 19 <i>Ibid.</i> 64 ; 14 Jur. 1017... ..	24
Vinecent v. Godson, 4 D. M. & G. 546 ; 24 L. J. Ch. 121	92, 94, 215
Viney v. Chaplin, 4 Drew. 237 ; 2 De G. & J. 468	178
Vint v. Constable, 25 L. T. 324	436
Vitale, <i>Ex parte</i> , 47 L. T. 480	457
Vivian v. Blomberg, 3 Bing. N. C. 311	28
Vivian v. Champion, 2 Ld. Raym. 1125	322
Vivian v. Jegen, L. R. 3 H. L. 285 ; 37 L. J. C. P. 313 ; 19 L. T. 218	53
Vivian v. Moat, 16 C. D. 730 ; 50 L. J. Ch. 331 ; 44 L. T. 210 ; 29 W. R. 504	449
Voisey, <i>Ex parte</i> , 21 C. D. 442 ; 52 L. J. Ch. 121 ; 47 L. T. 362 ; 31 W. R. 19... ..	83, 119, 147, 221, 300
Vonhollen v. Knowles, 12 M. & W. 662 ; 13 L. J. Ex. 140	126
Von Knoop v. Moss, 7 T. L. R. 500	231
Vowles v. Miller, 3 Taunt. 137	354
Vvyyan v. Arthur, 1 B. & C. 410	189, 405, 413
Waddilove v. Barnett, 2 Bing. N. C. 538	197
Wade v. Baker, 1 Ld. Raym. 131	9
Wadham v. Marlowe, 8 East, 314, n. (c) ; 4 Dougl. 54	410, 423
Wadham v. Postmaster-General, L. R. 6 Q. B. 644 ; 40 L. J. Q. B. 310 ; 24 L. T. 545 ; 19 W. R. 1082	335
Wagstaff v. Clinton, C. & E. 45	501
Wain v. Walters, 5 East, 10	106
Wake v. Hall, 7 Q. B. D. 295 ; 8 App. Cas. 195 ; 52 L. J. Q. B. 494 ; 48 L. T. 834 ; 31 W. R. 585	479, 480, 484, 485, 486
Wakefield v. Brown, 9 Q. B. 209 ; 15 L. J. Q. B. 373 ; 10 Jur. 853	404
Wakeman v. Lindsey, 14 Q. B. 625 ; 19 L. J. Q. B. 166	271
Waldron v. Jacob, Ir. R. 5 Eq. 131... ..	107
Walker, <i>Re</i> , 64 L. J. Q. B. 783 ; 72 L. T. 330	427
Walker's Case, 3 Rep. 22 a	212, 213, 410
Walker v. Ballantie, Cro. Jac. 102	394
Walker v. Giles, 6 C. B. 662 ; 18 L. J. C. P. 323	83
Walker v. Godé, 6 H. & N. 594 ; 30 L. J. Ex. 172	97, 438
Walker v. Hatton, 10 M. & W. 249	312, 389

	PAGE
Walker v. Hobbs, 23 Q. B. D. 458 ; 59 L. J. Q. B. 93 ; 61 L. T. 688 ; 38 W. R. 63	309
Walker v. Reeve, 2 Dougl. 461, n. ; 3 Dougl. 19	409, 420
Walker v. Richardson, 2 M. & W. 882	41, 458
Walker v. Wakeman, 1 Vent. 294 ; 2 Lev. 150 ; 3 Keb. 595	2
Wallace v. King, 1 H. Bl. 13	290, 291
Wallace v. M'Laren, 1 Man. & Ry. 516	64, 197
Waller v. Andrews, 3 M. & W. 312	203, 368
Wallis v. Delmar, 29 L. J. Ex. 276	431, 432
Wallis v. Hands, '93, 2 Ch. 75 ; 62 L. J. Ch. 586 ; 68 L. T. 428 ; 41 W. R. 471	187, 371, 376, 458
Wallis v. Littell, 11 C. B. N. S. 369 ; 31 L. J. C. P. 100 ; 8 Jur. N. S. 745 ; 10 W. R. 192	124
Wallis v. Savill, 2 Lutw. 1532	262
Wallis v. Smith, 21 C. D. 243 ; 52 L. J. Ch. 145 ; 47 L. T. 389 ; 31 W. R. 214	159
Walls v. Atcheson, 3 Bing. 462	210, 456
Walmsley v. Milne, 7 C. B. N. S. 115 ; 29 L. J. C. P. 97 ; 6 Jur. N. S. 125 ; 1 L. T. 62	481, 483, 487
Walrond v. Hawkins, L. R. 10 C. P. 342 ; 44 L. J. C. P. 116 ; 32 L. T. 119 ; 23 W. R. 390	471
Walsal v. Heath, Cro. Eliz. 656	20
Walsh v. Fussel, 6 Bing. 163	407
Walsh v. Lonsdale, 21 C. D. 9 ; 52 L. J. Ch. 2 ; 46 L. T. 858 ; 31 W. R. 109	82, 120, 190, 220, 222, 370, 403, 457
Walsh v. Walsh, 1 Ir. Eq. R. 209	236
Walters v. Northern Coal Mining Co., 5 D. M. & G. 629 ; 25 L. J. Ch. 633	38, 60, 114
Walter v. Rumball, 1 Ld. Raym. 53	266, 272, 277
Walter v. Selfe, 4 De G. & Sm. 315	337
Walton, <i>Ex parte</i> , 17 C. D. 746 ; 50 L. J. Ch. 657 ; 45 L. T. 1 ; 30 W. R. 395	424
Walton v. Johnson, 15 Sim. 352	346
Walton v. Waterhouse, 2 Wms. Saund. (ed. 1871) 826	75
Wankford v. Wankford, 1 Salk. 299	61
Wansborough v. Maton, 4 A. & E. 884	480
Ward v. Andrews, 2 Chit. 636	355
Ward v. Byrne, 5 M. & W. 548	333
Ward v. Const, 10 B. & C. 635	202, 203, 365
Ward v. Day, 4 B. & S. 337 ; 5 <i>Ibid.</i> 359 ; 33 L. J. Q. B. 254 ; 10 L. T. 578 ; 12 W. R. 829	86, 219, 468, 470
Ward v. Dudley (Countess), 57 L. T. 20	485
Ward v. Hartpole, 3 Bligh, 470	74
Ward v. Henley, 1 Y. & J. 285	285
Ward v. Lumley, 5 H. & N. 87, 656 ; 29 L. J. Ex. 322 ; 8 W. R. 184	460
Ward v. Monaghan, 11 T. L. R. 529	159
Ward v. Ryan, Ir. R. 10 C. L. 17	76
Ward v. Shew, 9 Bing. 608	225
Ward v. Smith, 11 Price, 19	113
Ward v. Ventom, Peake, Add. Cas. 126	289
Wardell v. Usher, 3 Sc. N. R. 508 ; 5 Jur. 802	486
Ware v. Booth, 10 T. L. R. 446	467
Waring v. Dewberry, 1 Str. 97	295
Waring v. King, 8 M. & W. 571	143
Warman v. Faithfull, 5 B. & A. 1042	80
Warner v. Willington, 3 Drew. 523 ; 25 L. J. Ch. 662 ; 2 Jur. N. S. 433	103, 106
Warren v. Moore, 42 Sol. Journ. 699	399
Warren v. Murray, '94, 2 Q. B. 648 ; 64 L. J. Q. B. 42 ; 71 L. T. 458 ; 43 W. R. 3	522
Warwicke v. Noakes, Peake, N. P. C. 67	215

	PAGE
Washborn <i>v.</i> Black, 11 East, 405, n. (a)	264, 265
Waterfall <i>v.</i> Penistone, 6 E. & B. 876 ; 26 L. J. Q. B. 100 ; 3 Jur. N. S. 15	483
Watherell <i>v.</i> Howells, 1 Camp. 227	325, 486
Watkins <i>v.</i> Milton (Overseers of), L. R. 3 Q. B. 350 ; L. J. M. C. 73 ; 18 L. T. 601 ; 16 W. R. 1059	86, 362
Watkins <i>v.</i> Nash, 20 Eq. 262	178
Watkinson <i>v.</i> Man, Cro. Eliz. 349	26
Watson <i>v.</i> Atkins, 3 B. & A. 647	366
Watson <i>v.</i> Home, 7 B. & C. 285	366
Watson <i>v.</i> Lane, 11 Ex. 769 ; 25 L. J. Ex. 101	484, 513
Watson <i>v.</i> Main, 3 Esp. 15	249
Watson <i>v.</i> Waud, 8 Ex. 335 ; 22 L. J. Ex. 161	147, 212, 220
Watson <i>v.</i> White, 12 T. L. R. 387	297
Watts <i>v.</i> Kelson, 6 Ch. 166 ; 40 L. J. Ch. 126 ; 24 L. T. 209 ; 19 W. R. 338	133, 134, 135
Wauton <i>v.</i> Coppard, '99, 1 Ch. 92 ; 68 L. J. Ch. 8 ; 79 L. T. 467 ; 47 W. R. 72	334, 337
Weak <i>v.</i> Estcourt, 9 Price, 595	180
Weakly <i>v.</i> Bucknell, Cowp. 473	94
Weatherall <i>v.</i> Geering, 12 Ves. 504	392
Weaver <i>v.</i> Sessions, 6 Taunt. 154	340
Webb <i>v.</i> Austin, 7 M. & Gr. 701 ; 13 L. J. C. P. 203	75
Webb <i>v.</i> Fagotti Bros., 79 L. T. 589	408
Webb <i>v.</i> Fordred, 32 J. P. 804	529
Webb <i>v.</i> Paternoster, 2 Rol. Rep. 143	86
Webb <i>v.</i> Plumer, 2 B. & A. 746	346, 500
Webb <i>v.</i> Rhodes, 3 Bing. N. C. 732	183
Webb <i>v.</i> Rorke, 2 Sch. & Lef. 661	73
Webb <i>v.</i> Russell, 3 T. R. 393	70, 416, 453
Webb <i>v.</i> Earl of Shaftesbury, 7 Ves. 480	61
Webber <i>v.</i> Lee, 9 Q. B. D. 315 ; 51 L. J. Q. B. 485 ; 47 L. T. 215 ; 30 W. R. 866	104
Webber <i>v.</i> Stanley, 16 C. B. N. S. 698 ; 33 L. J. C. P. 217	128
Webster <i>v.</i> Southey, 36 C. D. 9 ; 56 L. J. Ch. 785 ; 56 L. T. 879 ; 35 W. R. 622	42, 521
Weddell <i>v.</i> Capes, 1 M. & W. 50	455
Weeding <i>v.</i> Weeding, 1 J. & H. 424	160
Weeks <i>v.</i> Birch, 69 L. T. 759	77
Weeton <i>v.</i> Woodcock, 7 M. & W. 14	492, 493
Weigall <i>v.</i> Waters, 6 T. R. 488	201, 310
Welch <i>v.</i> Myers, 4 Camp. 368	247
Weld <i>v.</i> Baxter, 11 Ex. 816 ; 1 H. & N. 568 ; 26 L. J. Ex. 112 ; 3 Jur. N. S. 91	77
Weller <i>v.</i> Spiers, 26 L. T. 866 ; 20 W. R. 772	76
Welford <i>v.</i> Beazeley, 3 Atk. 503	105
Wellby <i>v.</i> Still, '95, 1 Ch. 524 ; 64 L. J. Ch. 495 ; 72 L. T. 108	185
Wells, <i>Re</i> , 31 W. R. 764	4
Wells <i>v.</i> Attenborough, 24 L. T. 312 ; 19 W. R. 465	336
Wells <i>v.</i> Hull (Mayor of), L. R. 10 C. P. 402 ; 44 L. J. C. P. 257 ; 32 L. T. 615 ; 23 W. R. 562	23, 84
Wells <i>v.</i> Moody, 7 C. & P. 59	260, 262
Welsh <i>v.</i> Rose, 6 Bing. 638	252
Werth <i>v.</i> London and Westminster Loan Co., 5 T. L. R. 320	260
Wesley <i>v.</i> Walker, 38 L. T. 284 ; 26 W. R. 368	107
West <i>v.</i> Blakeway, 2 M. & Gr. 729 ; 10 L. J. C. P. 173 ; 5 Jur. 630	481, 495
West <i>v.</i> Dobb, L. R. 4 Q. B. 634 ; 5 <i>Ibid.</i> 460 ; 39 L. J. Q. B. 190 ; 23 L. T. 76 ; 18 W. R. 1167	165, 394, 402, 406
West <i>v.</i> Fritche, 3 Ex. 216 ; 18 L. J. Ex. 50	83
West <i>v.</i> Houghton, 4 C. P. D. 197 ; 40 L. T. 364 ; 27 W. R. 678	2
West <i>v.</i> Lassels, Cro. Eliz. 851	211, 213

	PAGE
West v. Nibbs, 4 C. B. 172 ; 17 L. J. C. P. 150	273
West v. Rogers, 4 T. L. R. 229	473
West Ham v. Fourth City Building Society, '92, 1 Q. B. 654 ; 61 L. J. M. C. 128 ; 66 L. T. 350 ; 40 W. R. 446	361
West Ham v. Iles, 8 App. Cas. 386 ; 52 L. J. Q. B. 650 ; 49 L. T. 205 ; 31 W. R. 928	361
West London Syndicate v. Commissioners of Inland Revenue, '93, 2 Q. B. 507 ; 47 W. R. 125	399
Westbourne Grove Drapery Co., <i>Re</i> , 5 C. D. 248 ; 44 L. J. Ch. 525 ; 36 L. T. 439 ; 25 W. R. 509	304
Westminster Fire Office v. Glasgow Provident Society, 13 App. Cas. 699 ; 59 L. T. 641	360
Westmoreland (Earl of) v. New Sharlston Colliery Co., 43 Sol. Journ. 569	132
West of England Fire Insurance Co. v. Isaacs, 12 T. L. R. 466	359
Weston v. Collins, 34 L. J. Ch. 353 ; 11 Jur. N. S. 190 ; 12 L. T. 4 ; 13 W. R. 510	160
Weston v. Metropolitan Asylum District, 9 Q. B. D. 404 ; 51 L. J. Q. B. 399 ; 46 L. T. 580 ; 30 W. R. 623	200
Westwood v. Cowne, 1 Stark. 172	275
Whalley v. Tompson, 1 B. & P. 371	133
Wharton v. Naylor, 12 Q. B. 673 ; 17 L. J. Q. B. 278 ; 12 Jur. 894	235
Wharton v. Walton, 7 Q. B. 474 ; 14 L. J. Q. B. 321	174
Wheatley v. Westminster Brymbo Coal Co., 9 Eq. 538 ; 39 L. J. Ch. 175 ; 22 L. T. 7 ; 18 W. R. 162	343
Wheelodon v. Burrows, 12 C. D. 31 ; 48 L. J. Ch. 853 ; 41 L. T. 327 ; 28 W. R. 196	135
Wheeler v. Branscombe, 5 Q. B. 373 ; 13 L. J. Q. B. 83	68, 197
Wheeler v. Montefiore, 2 Q. B. 133	187
Wheeler v. Stevenson, 6 H. & N. 155 ; 30 L. J. Ex. 46 ; 3 L. T. 702 ; 9 W. R. 233	210
Wheelwright v. Walker, 23 C. D. 752 ; 52 L. J. Ch. 274 ; 48 L. T. 70 ; 31 W. R. 363	46
Whistler v. Paslow, Cro. Jac. 487	138, 139
Whitaker, <i>Re</i> , 21 Q. B. D. 261 ; 57 L. J. Q. B. 527 ; 59 L. T. 255 ; 36 W. R. 736	426
Whitbread v. Brockhurst, 1 Bro. C. C. 404	110
Whitecot v. Fox, Cro. Jac. 398	468
Whitechurch v. Bevis, 2 Bro. C. C. 559	104
White v. Bayley, 10 C. B. N. S. 227 ; 30 L. J. C. P. 253 ; 7 Jur. N. S. 948	87
White v. Binstead, 13 C. B. 304 ; 22 L. J. C. P. 115 ; 17 Jur. 394	294, 296
White's Charities, <i>Re</i> , '98, 1 Ch. 659	129
White v. Cuyler, 6 T. R. 176	72
White v. Greenish, 11 C. B. N. S. 209	198
White v. Hay, 72 L. T. 281	107, 395
White v. Heywood, 5 T. L. R. 115	256
White v. Hunt, L. R. 6 Ex. 32 ; 40 L. J. Ex. 23 ; 23 L. T. 559	59, 403
White v. Nicholson, 4 M. & Gr. 95 ; 11 L. J. C. P. 264	309
White and Smith's Contract, <i>Re</i> , '96, 1 Ch. 637 ; 65 L. J. Ch. 481 ; 74 L. T. 377 ; 44 W. R. 424	398
White v. Southend Hotel Co., '97, 1 Ch. 767 ; 66 L. J. Ch. 387 ; 76 L. T. 273 ; 45 W. R. 434	405
White v. Tyndall, 13 App. Cas. 263 ; 57 L. J. P. C. 114 ; 58 L. T. 741	157
White v. Wakley, 26 Beav. 17 ; 28 L. J. Ch. 77 ; 4 Jur. N. S. 988	320
White v. Whitewood, 13 T. L. R. 409	111, 522
Whiteacre v. Symonds, 10 East, 13	448
Whitehead v. Bennett, 27 L. J. Ch. 474 ; 6 W. R. 351	484, 485
Whitehead v. Clifford, 5 Taunt. 518	456
Whitehead v. Parkes, 2 H. & N. 870 ; 27 L. J. Ex. 169	135
Whitehead v. Taylor, 10 A. & E. 210	227, 255
Whitfield v. Brandwood, 2 Stark. 440	202, 365

	PAGE
Whitefield v. Weedon, 2 Chit. 685	352
Whitham v. Kershaw, 16 Q. B. D. 613 ; 54 L. T. 124 ; 34 W. R. 340	329
Whitley Partners, <i>Re</i> , 32 C. D. 337 ; 55 L. J. Ch. 540 ; 54 L. T. 912 ; 34 W. R. 505	424
Whitley v. Roberts, M'Clel. & Y. 107	228
Whitlock's Case, 8 Rep. 69 b	148, 416
Whitlock v. Horton, Cro. Jac. 91	63, 125
Whitmore v. Humphries, L. R. 7 C. P. 1 ; 41 L. J. C. P. 43 ; 25 L. T. 496 ; 20 W. R. 79	513
Whitmore v. Walker, 2 C. & K. 615	196, 206
Whittaker v. Barker, 1 Cr. & M. 113	499
Whittick v. Mozley, C. & E. 86	110
Whitton v. Peacock, 3 My. & K. 325	65, 416
Whitty v. Dillon, 2 F. & F. 67	355
Whitworth v. Maden, 2 C. & K. 517	291
Whitworth v. Smith, 5 C. & P. 250	291
Whyddon's Case, Cro. Eliz. 520	178
Wick v. Hodgson, 12 Moore, 213	174
Wickenden v. Webster, 6 E. & B. 387 ; 25 L. J. Q. B. 264 ; 2 Jur. N. S. 590	334
Wickham v. Bath (Marquis of), 35 Beav. 59 ; 1 Eq. 17 ; 35 L. J. Ch. 5 ; 11 Jur. N. S. 988 ; 13 L. T. 313 ; 14 W. R. 21	41
Wickham v. Hawker, 7 M. & W. 63	85, 137, 383
Wickham v. Lee, 12 Q. B. 521 ; 18 L. J. Q. B. 21 ; 12 Jur. 628	516
Wigglesworth v. Dallison, 1 Dougl. 201	346, 499
Wight v. Dicksons, 1 Dow, 141	341
Wight v. Hopetoun, 4 Macq. 729	163
Wigsell v. School for Blind, 8 Q. B. D. 357 ; 51 L. J. Q. B. 330 ; 46 L. T. 422 ; 30 W. R. 474	323
Wilbraham v. Livesey, 18 Beav. 206	150, 153
Wilcox v. Redhead, 49 L. J. Ch. 539 ; 28 W. R. 795	102
Wildbor v. Rainforth, 8 B. & C. 4	518, 527
Wilde v. Waters, 16 C. B. 637 ; 24 L. J. C. P. 193 ; 1 Jur. N. S. 1021	491, 496
Wilde v. Watson, 1 L. R. Ir. 402	71
Wilder v. Speer, 8 A. & E. 547	268
Wilkins, <i>Re</i> , 6 Jur. 308	11
Wilkins v. Fry, 1 Mer. 244	423
Wilkins v. Wood, 17 L. J. Q. B. 319 ; 12 Jur. 583	347
Wilkinson v. Calvert, 3 C. P. D. 360 ; 47 L. J. C. P. 679 ; 38 L. T. 813 ; 26 W. R. 829	435
Wilkinson v. Cawood, 3 Anst. 905	206, 418, 420
Wilkinson v. Clements, 8 Ch. 96 ; 42 L. J. Ch. 38 ; 27 L. T. 834 ; 21 W. R. 90	114
Wilkinson v. Colley, 5 Burr. 2694	444, 514
Wilkinson v. Collyer, 13 Q. B. D. 1 ; 53 L. J. Q. B. 278 ; 51 L. T. 299 ; 32 W. R. 614	366
Wilkinson v. Gaston, 9 Q. B. 137	142
Wilkinson v. Hall, 3 Bing. N. C. 508	436, 515
Wilkinson v. Ibbett, 2 F. & F. 300	262, 277
Wilkinson v. Peel, '95, 1 Q. B. 516 ; 64 L. J. Q. B. 178 ; 72 L. T. 151 ; 43 W. R. 302	251
Wilkinson v. Rogers, 2 D. J. & S. 62 ; 10 Jur. N. S. 5, 162 ; 9 L. T. 434, 696 ; 12 W. R. 119, 284	338, 405
Wilkinson v. Terry, 1 Moo. & R. 377	252
Wilks v. Back, 2 East, 142	72
Williams, <i>Ex parte</i> , 7 C. D. 138 ; 47 L. J. Bk. 26 ; 37 L. T. 764 ; 26 W. R. 274	300
Williams v. Bartholomew, 1 B. & P. 326	78, 198
Williams v. Bosanquet, 1 Br. & B. 238	401, 403, 405, 420
Williams v. Brisco, 22 C. D. 441 ; 48 L. T. 198 ; 31 W. R. 907	114
Williams v. Burrell, 1 C. B. 402 ; 14 L. J. C. P. 98 ; 9 Jur. 282	376, 377

	PAGE
Williams v. Cheney, 3 Ves. 59	386
Williams v. Earle, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041	167, 397, 405, 406
Williams v. Evans, 19 Eq. 547; 44 L. J. Ch. 369; 22 L. T. 359; 23 W. R. 466	110
Williams v. Green, Cro. Eliz. 884	178
Williams v. Hayward, 1 E. & E. 1040; 28 L. J. Q. B. 374; 5 Jur. N. S. 1417; 7 W. R. 563	197, 387
Williams v. Heales, L. R. 9 C. P. 177; 43 L. J. C. P. 80; 30 L. T. 20; 22 W. R. 317	402, 420
Williams v. Holmes, 8 Ex. 861; 22 L. J. Ex. 283	222, 232
Williams v. Jenkins, '93, 1 Ch. 700; 62 L. J. Ch. 665; 68 L. T. 251; 41 W. R. 489	49
Williams v. Jenkins, '94, W. N. 176	64
Williams v. Jones, 3 H. & C. 256	85
Williams v. Jones, 11 A. & E. 643	291
Williams v. Jones, 36 W. R. 573	116
Williams v. Jordan, 3 C. D. 517; 46 L. J. Ch. 681; 26 W. R. 230	106
Williams v. Lake, 2 E. & E. 349	106
Williams v. Lewsey, 8 Bing. 28	292
Williams v. Millington, 1 H. Bl. 81	232
Williams v. Morris, 8 M. & W. 488... ..	278
Williams v. Roberts, 7 Ex. 618; 22 L. J. Ex. 61	245, 246, 248
Williams v. Sawyer, 3 Ball & B. 70	456
Williams v. Stiven, 9 Q. B. 14; 15 L. J. Q. B. 321; 10 Jur. 804	220, 250
Williams v. Taperell, 87 L. R. 241	6, 518
Williams v. Williams, L. R. 9 C. P. 659; 43 L. J. C. P. 382; 30 L. T. 638; 22 W. R. 706	317
Williamson v. Williamson, 9 Ch. 729; 43 L. J. Ch. 738; 31 L. T. 291	386
Willis, <i>Re</i> , 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 36 W. R. 793	84
Willis v. Watney, 51 L. J. Ch. 181; 45 L. T. 739; 30 W. R. 424	130
Willmott v. Barber, 15 C. D. 96; 49 L. J. Ch. 792; 43 L. T. 95; 28 W. R. 911	396
Willoughby D'Eresby, <i>Ex parte</i> , 44 L. T. 781; 29 W. R. 527	481, 494
Willoughby v. Backhouse, 2 B. & C. 821; 2 L. J. O. S. K. B. 174	261, 280
Wills v. Stradling, 3 Ves. 378	110
Willson v. Davenport, 5 C. & P. 531	200
Willson v. Leonard, 3 Beav. 373	403
Willson v. Love, '96, 1 Q. B. 626	159, 199
Wilmot v. Rose, 3 E. & B. 563; 23 L. J. Q. B. 281; 18 Jur. 518	352
Wilmote v. Carn, Cro. Eliz. 19	133
Wilson, <i>Re</i> , 13 Eq. 186; 20 W. R. 363	424
Wilson, <i>Re</i> , 62 L. J. Q. B. 628	214, 425
Wilson v. Abbott, 3 B. & C. 88	96
Wilson v. Bolton, 10 T. L. R. 17	476
Wilson v. Chisholm, 4 C. & P. 474	80
Wilson v. Duckett, 2 Mod. 61	234
Wilson v. Finch Hatton, 2 Ex. D. 336; 46 L. J. Q. B. 489; 36 L. T. 473; 25 W. R. 537	332
Wilson v. Hart, 1 Ch. 463; 35 L. J. Ch. 569; 12 Jur. N. S. 460; 14 L. T. 499	388, 407
Wilson v. Kearse, Peake, Add. Cas. 196	11
Wilson v. Nightingale, 8 Q. B. 1034; 15 L. J. Q. B. 309; 10 Jur. 917	270
Wilson v. Queen's Club, '91, 3 Ch. 522; 60 L. J. Ch. 698; 65 L. T. 42; 40 W. R. 172	67
Wilson v. Smith, 12 M. & W. 401	172
Wilson v. Wallani, 5 Ex. D. 155; 49 L. J. Ex. 437; 42 L. T. 375; 28 W. R. 597	423, 424
Wilson v. W. Hartlepool Ry. Co., 2 D. J. & S. 475; 34 L. J. Ch. 241; 11 Jur. N. S. 124	110

	PAGE
Wilson v. Whateley, 1 J. & H. 436 ; 30 L. J. Ch. 673 ; 7 Jur. N. S. 908 ; 3 L. T. 617 ; 9 W. R. 331	496
Wilson v. Wigg, 10 East, 313	420
Wilson v. Wilson, 14 C. B. 616 ; 23 L. J. C. P. 137 ; 18 Jur. 581 ; 2 W. R. 421	358
Wilton v. Dunn, 17 Q. B. 294 ; 21 L. J. Q. B. 60 ; 15 Jur. 1104	197
Wiltshire v. Cosslett, 5 T. L. R. 410	336
Wiltshire v. Cottrell, 1 E. & B. 674 ; 22 L. J. Q. B. 177 ; 17 Jur. 758	480
Wimbledon Conservators v. Nicol, 10 T. L. R. 247	520
Windham's Case, 5 Rep. 7 a	143
Windsor's Case, Dean of, 5 Rep. 24	404
Windsor, Dean of v. Gover, 2 Saund. 302	189
Winn v. Bull, 7 C. D. 29 ; 47 L. J. Ch. 139 ; 26 W. R. 230	103
Winn v. Ingilby, 5 B. & A. 625	491
Winn v. White, 2 W. Bl. 840	320
Winter v. Brockwell, 8 East, 308	87
Winter v. Dumergue, 12 Jur. N. S. 726 ; 14 W. R. 699	396
Winterbottom v. Ingham, 7 Q. B. 611 ; 14 L. J. Q. B. 298 ; 10 Jur. 4	91
Winterbourne v. Morgan, 11 East, 395	280, 291
Wintle v. Freeman, 11 A. & E. 539	294
Wiscot's Case, 2 Rep. 60 b	20
Withers v. Bircham, 3 B. & C. 254	156
Witton v. Bye, Cro. Jac. 486	191
Witty v. Williams, 10 L. T. 457 ; 12 W. R. 755	146, 222
Wix v. Rutson, '99, 1 Q. B. 474 ; 68 L. J. Q. B. 298 ; 80 L. T. 168	368
Wollaston v. Hawkewill, 3 M. & Gr. 297 ; 10 L. J. C. P. 303	386,
	402, 420, 421
Wollaston v. Stafford, 15 C. B. 278	296
Wolveridge v. Steward, 1 Cr. & M. 644 ; 3 L. J. Ex. 60	149, 410
Womersley v. Dally, 26 L. J. Ex. 219	347, 500
Wood v. Alyward, 58 L. T. 662	107
Wood v. Beard, 2 Ex. D. 30 ; 46 L. J. Q. B. 100 ; 35 L. T. 866	145
Wood & Chivers' Case, 4 Leon. 179	466
Wood v. Clarke, 1 Cr. & J. 484	231
Wood v. Cooper, '94, 3 Ch. 671 ; 63 L. J. Ch. 845 ; 71 L. T. 222 ; 43 W. R. 201	327, 338
Wood v. Copper Miners' Co., 7 C. B. 906 ; 18 L. J. C. P. 293	149
Wood v. Davis, 6 L. R. Ir. 50	145
Wood & Foster's Case, 1 Leon. 42	378
Wood v. Hewett, 8 Q. B. 913 ; 15 L. J. Q. B. 247 ; 10 Jur. 390	480,
	482, 494
Wood v. Lake, 13 M. & W. 848, note (a) ; Sayer, 3	86
Wood v. Leadbitter, 13 M. & W. 838	87, 120
Wood v. Marley, 11 A. & E. 34	278
Wood v. Nunn, 5 Bing. 10	248, 260
Wood v. Patteson, 10 Beav. 541	59
Wood v. Rowcliffe, 6 Ex. 407	128
Wood v. Silcock, 50 L. T. 251 ; 32 W. R. 845	113, 115
Wood v. Tate, 2 B. & P. N. R. 247	23
Woodcock v. Gibson, 4 B. & C. 462	36
Woodcock v. Nutt, 8 Bing. 170	459
Woodcock v. Worthington, 2 Y. & J. 4	183
Woodcroft v. Thompson, 3 Lev. 48	267
Woodhouse v. Jenkins, 9 Bing. 431	376
Woodhouse v. Walker, 5 Q. B. D. 404 ; 49 L. J. Q. B. 609 ; 42 L. T. 770 ; 28 W. R. 765	328
Woods, Re, 3 C. D. 459 ; 45 L. J. Bk. 141 ; 24 W. R. 1008	425
Woods v. Durrant, 16 M. & W. 149 ; 16 L. J. Ex. 313	265
Woods v. Hyde, 31 L. J. Ch. 295 ; 6 L. T. 317 ; 10 W. R. 339	161
Woods v. Pope, 1 Bing. N. C. 467 ; 6 C. & P. 782	323
Woods v. Tate, 2 B. & P. N. R. 247	94
Woodward v. Gyles, 2 Vern. 119	199

	PAGE
Woolcock v. Dew, 1 F. & F. 337	314, 320
Wooler v. Knott, 1 Ex. D. 265 ; 45 L. J. Ex. 884 ; 35 L. T. 121 ; 24 W. R. 1004	339
Woollam v. Hearn, 7 Ves. 211	121
Wootley v. Gregory, 2 Y. & J. 536	271, 460
Wooton v. Edwin, 12 Rep. 36	148
Worledge v. Benbury, Cro. Jac. 436	65
Worthington v. Gimson, 2 E. & E. 618 ; 29 L. J. Q. B. 116	133
Worthington v. Warrington, 5 C. B. 635 ; 17 L. J. C. P. 117	174
Wotton v. Hele, 2 Wms. Saund. 178, note (3)	371
Wrenford v. Gyles, Cro. Eliz. 643	99, 143
Wright v. Burroughes, 3 C. B. 685 ; 16 L. J. C. P. 6 ; 12 Jur. 968	417
Wright v. Cartwright, 1 Burr. 282 ; 1 Ld. Ken. 529	100, 143
Wright v. Colls, 8 C. B. 150 ; 19 L. J. C. P. 60 ; 13 Jur. 1056	113
Wright v. Dewes, 1 A. & E. 641	235
Wright v. Goddard, 8 A. & E. 144	323
Wright v. Pitt, 12 Eq. 408 ; 40 L. J. Ch. 558 ; 25 L. T. 13	38, 60
Wright v. Smith, 5 Esp. 203	515
Wright v. Stavert, 2 E. & E. 721 ; 29 L. J. Q. B. 164 ; 6 Jur. N. S. 867 ; 8 W. R. 413	104
Wright v. Tracey, Ir. R. 7 C. L. 134 ; 8 <i>Ibid.</i> 478	93, 199
Wright v. Trezevant, 1 Moo. & M. 231	81
Wrotlesley v. Adams, Plowd. 187 ; Dyer 177 b, pl. 35	127, 141
Wyatt v. Cole, 36 L. T. 613	95, 97
Wyburd v. Tuck, 1 B. & P. 464	143
Wylson v. Dunn, 34 C. D. 569 ; 56 L. J. Ch. 855 ; 56 L. T. 192 ; 35 W. R. 405... ..	105
Wyndham v. Way, 4 Taunt. 316	138, 485, 486
Wynne, <i>Re</i> , 7 Ch. 229	11, 12
Wynne, <i>Re</i> : Finch v. Wynne-Finch, 48 L. T. 129	123
Wynne v. Lord Newborough, 1 Ves. 164	72
X, <i>Re</i> , '94, 2 Ch. 415... ..	12
Yates v. Dunster, 11 Ex. 15 ; 24 L. J. Ex. 226	313
Yates v. Eastwood, 6 Ex. 805 ; 20 L. J. Ex. 303	281
Yates v. Ratledge, 5 H. & N. 249 ; 29 L. J. Ex. 117	292, 293, 295
Yates v. Tearle, 6 Q. B. 282 ; 12 L. J. Q. B. 289 ; 8 Jur. 774	282
Yaw v. Leman, 1 Wils. 21	365
Yellowly v. Gower, 11 Ex. 274 ; 24 L. J. Ex. 289	53, 55, 328
Yeoman v. Ellison, L. R. 2 C. P. 681 ; 36 L. J. C. P. 326 ; 17 L. T. 65	219
Young v. Brompton Waterworks Co., 1 B. & S. 675	287
Young v. Holmes, 1 Str. 70	419
Young v. Raincock, 7 C. B. 310 ; 18 L. J. C. P. 193 ; 13 Jur. 539	372
Young v. Spencer, 10 B. & C. 145	326
Zaffert, <i>Re</i> , 1 Morr. 72	426
Zouch v. Parsons, 3 Burr. 1794	6, 7, 8, 457
Zouch v. Willingale, 1 H. Bl. 311	448

TABLE OF STATUTES.

[Where there is no short title to a statute, a descriptive title has been inserted.]

	PAGE
20 Hen. 3, c. 4 (Statute of Merton)...	64
51 Hen. 3, stat. 4 (Ruffhead); See Statutes Revised, I. 74 (<i>Statutes of uncertain date</i>) (Distress) ...	240, 267
52 Hen. 3 (Statute of Marlbridge)—	
c. 4 ...	260, 267
c. 15 ...	243
c. 23 ...	328
3 Edw. 1, c. 16 (Statute of Westminster I.) ...	243, 267
6 Edw. 1 (Statute of Gloucester), c. 5 ...	328
7 Edw. 1, stat. 2, c. 1 (De Viris Religiosis) ...	24
13 Edw. 1 (Statute of Westminster II.), c. 46 ...	64
5 Ric. 2, c. 7 (Forcible Entries) ...	518
15 Ric. 2, c. 2 (Forcible Entries) ...	518
8 Hen. 6, c. 9 (Forcible Entries) ...	518
27 Hen. 8, c. 10 (Statute of Uses) ...	185
32 Hen. 8, c. 28 (Ecclesiastical Leases), ss. 1, 2, 4 ...	26
c. 34 (Assignment of Reversion)—	
s. 1 ...	413
s. 2 ...	414
33 Hen. 8, c. 27 (College Leases) ...	26
5 & 6 Edw. 6, c. 16 (Sale of Offices), ss. 2, 3 ...	3
1 & 2 Ph. & M. c. 12 (Imponnding)—	
s. 1 ...	266
s. 2 ...	282
1 Eliz. c. 19 (Lease by Bishop), s. 4 ...	27
13 Eliz. c. 10 (Ecclesiastical Leases), s. 3 ...	27, 28
14 Eliz. c. 11 (Ecclesiastical Leases), ss. 17, 19 ...	28
c. 14 (Hospital Leases) ...	27
18 Eliz. c. 11 (Ecclesiastical Leases), s. 1 ...	28
31 Eliz. c. 11 (Forcible Entries) ...	518
39 Eliz. c. 5 (Hospital Leases) ...	27
12 Car. 2, c. 24 (Testamentary Guardians), ss. 8, 9 ...	9
15 Car. 2, c. 17 (Bedford Level), s. 8 ...	181
18 & 19 Car. 2, c. 11 (Proof of Death of Cestui que Vie) ...	451
29 Car. 2, c. 3 (Statute of Frauds) ...	73
s. 1 ...	118
s. 2 ...	118, 119
s. 3 ...	399, 454
s. 4 ...	103, 114, 123, 124, 397
2 Will. & M. sess. 1, c. 5 (Sale of Distress) ...	262, 264, 274, 276
s. 1 ...	265, 269
s. 2 ...	234, 265, 278, 281
s. 3 ...	269
s. 4 ...	288
8 & 9 Will. 3, c. 11 (Action for Penalty), s. 8 ...	159
1 Anne c. 1 (Crown Lands Act, 1702), s. 5... ..	33

4 Anne c. 16 (in Statutes Revised, 4 & 5 Anne c. 3) (Grant of Reversion)—	
s. 9	412
s. 10	196, 198, 413
6 Anne c. 18 (in Statutes Revised, c. 72) (Cestui que Vie Act, 1707)—	
ss. 1, 2	451
s. 3	452
7 Anne c. 12 (Diplomatic Privileges Act, 1708), s. 3	239
c. 20 (Middlesex Registry Act, 1708)	179, 181, 400
8 Anne c. 14 (in Statutes Revised, c. 18) (Landlord and Tenant Act, 1709)—	
s. 1	292, 298
s. 2	245
ss. 6, 7	250, 469
4 Geo. 2, c. 28 (Landlord and Tenant Act, 1730)	264, 470, 476
s. 1	514
s. 2	447
s. 5	234
s. 6	223, 461
11 Geo. 2, c. 19 (Distress for Rent Act, 1737)	213, 244
ss. 1, 2	245
ss. 3, 4	246
s. 5	247
s. 7	245
s. 8	234, 266, 275, 281
s. 9	266, 270, 274
s. 10	264
s. 11	83
s. 14	305, 460
s. 15	226
s. 16	530
s. 17	531
s. 18	517
s. 19	290
ss. 20, 21	291
s. 23	285
5 Geo. 3, c. 17 (Ecclesiastical Leases Act, 1765)	2
s. 1	26
13 Geo. 3, c. 81 (Inclosure Act, 1773), s. 15	2, 64
14 Geo. 3, c. 78 (Fires Prevention (Metropolis) Act, 1774)—	
s. 41	360
s. 83	359
s. 86	309
25 Geo. 3, c. 77 (Fires Prevention (Metropolis) Act, 1785)	330
38 Geo. 3, c. 5 (Land Tax Act, 1797), ss. 17, 35	202
39 & 40 Geo. 3, c. 41 (Ecclesiastical Leases Act, 1800)	26, 27
42 Geo. 3, c. 116 (Land Tax Redemption Act, 1802), s. 126	203
48 Geo. 3, c. 73 (Duchy of Lancaster)	34
c. 149 (Probate and Legacy Duties Act, 1808)	173
52 Geo. 3, c. 161 (Duchy of Lancaster)	34
55 Geo. 3, c. 184 (Stamp Act, 1815)—	
s. 8	171
ss. 75, 76, 77	172
56 Geo. 3, c. 50 (Sale of Farming Stock Act, 1816)—	
s. 1	350
s. 2	351
s. 3	235, 351
s. 6	236
s. 7	346
s. 11	278, 351
57 Geo. 3, c. 52 (Deserted Tenements Act, 1817)	530
c. 93 (Distress (Costs) Act, 1817)—	
ss. 1 2	281
Schedule	275

59 Geo. 3, c. 12 (Poor Relief Act, 1819)—	
ss. 12, 13	36
s. 17	35, 36, 229
s. 19	361
ss. 24, 25	527
1 Geo. 4, c. 87 (Recovery of Possession by Landlords), s. 1	524
1 & 2 Geo. 4, c. 52 (Duchy of Lancaster), ss. 12, 13	34
3 Geo. 4, c. 126 (Turnpike Roads Act, 1822), s. 57	120
10 Geo. 4, c. 44 (Metropolitan Police Act, 1829), s. 4	249, 289
c. 50 (Crown Lands Act, 1829)—	
ss. 22—31	33
ss. 47, 49, 63	33
s. 77	172
s. 90	226
s. 91	807
10 Geo. 4 & 1 Will. 4, c. 65 (Infants' Property Act, 1830)	3, 6, 15
s. 12	9, 18
ss. 14, 15	10
s. 16	6, 18
s. 17	5, 176
ss. 20, 21, 31... ..	6
1 & 2 Will. 4, c. 32 (Game Act, 1831)—	
ss. 2, 8, 11	379
s. 12	379, 380
s. 30	379, 380
c. 42 (Poor Relief Act, 1831), s. 2	36
2 Will. 4, c. 1 (Crown Lands Act, 1832), s. 21	33
c. 42 (Allotments Act, 1832)	36
3 & 4 Will. 4, c. 27 (Real Property Limitation Act, 1833)—	
s. 7	519
s. 8	520
s. 9	522
s. 14	522
s. 24	522
s. 34	523
s. 42	253, 300, 307
c. 42 (Civil Procedure Act, 1833)—	
ss. 3, 4, 5	307
s. 28	307
ss. 37, 38	226
c. 74 (Fines and Recoveries Act, 1833)	15, 16, 19
ss. 15, 22, 34	43
s. 40	20, 43
s. 41	43
s. 77	17
4 & 5 Will. 4, c. 22 (Apportionment Act, 1834)	213
5 & 6 Will. 4, c. 76 (Municipal Corporations Act, 1835)... ..	34
ss. 94, 96	34
6 & 7 Will. 4, c. 20 (Ecclesiastical Leases Act, 1836)—	
s. 1	31, 32
s. 4	32
c. 64 (Ecclesiastical Leases (Amendment) Act, 1836)	31
c. 71 (Tithe Act, 1836)	213
s. 70	204, 205
s. 80	204
ss. 81, 85	205
c. 104 (Municipal Corporations), s. 2	34
7 Will. 4 & 1 Vict. c. 69 (Tithe Act, 1837), s. 8	205
1 & 2 Vict. c. 43 (Dean Forest (Miners) Act, 1838), s. 25	34
c. 74 (Small Tenements Recovery Act, 1838)—	
s. 1	527
s. 2	528

	PAGE
1 & 2 Vict. c. 74 (Small Tenements Recovery Act, 1838), ss. 3, 5, 6 ...	529
c. 95 (Pensions Act, 1838), s. 4 ...	33
c. 106 (Pluralities Act, 1838)—	
s. 28 ...	32
s. 59 ...	31
2 & 3 Vict. c. 47 (Metropolitan Police Act, 1839), s. 67 ...	250
c. 71 (Metropolitan Police Courts Act, 1839), s. 39 ...	289
3 & 4 Vict. c. 77 (Grammar Schools Act, 1840), s. 19 ...	527
c. 84 (Metropolitan Police Courts Act, 1840), s. 13 ...	530
4 & 5 Vict. c. 38 (Schools Sites Act, 1841) ...	213
5 & 6 Vict. c. 27 (Ecclesiastical Leases Act, 1842), ss. 1, 13, 15 ...	29
c. 35 (Income Tax Act, 1842)—	
s. 60 ...	201
ss. 73, 103 ...	363
c. 45 (Copyright Act, 1842), s. 26 ...	288
c. 97 (Limitations of Actions and Costs Acts, 1842) ...	269
s. 2 ...	291
c. 108 (Ecclesiastical Leasing Act, 1842) ...	30
s. 1 ...	29, 30, 176
ss. 2, 3 ...	29, 30
s. 4 ...	29, 30, 176
ss. 5—9 ...	29, 30
s. 18 ...	29, 30
ss. 20—32 ...	29, 30
6 & 7 Vict. c. 30 (Pound-breach Act, 1843), s. 1 ...	269
c. 40 (Hosiery Act, 1843), ss. 1, 2, 18, 19 ...	238
7 & 8 Vict. c. 37 (School Sites Act, 1844) ...	213
c. 65 (Duchy of Cornwall), s. 43 ...	172
c. 66 (Aliens), s. 5 ...	22
c. 96 (Execution Act, 1844), s. 67 ...	296
8 & 9 Vict. c. 18 (Lands Clauses Acts, 1845)—	
s. 68 ...	415
s. 119 ...	213
c. 99 (Crown Lands Act, 1845), ss. 1, 6 ...	33
c. 106 (Real Property Act, 1845)—	
s. 2 ...	125
s. 3 ...	6, 118, 120, 399, 455
s. 5 ...	165
s. 6 ...	164
s. 9 ...	233, 453, 461
c. 118 (Inclosure Act, 1845), s. 111 ...	527
c. 124 (Leases Act, 1845) ...	125
9 & 10 Vict. c. 74 (Baths and Wash-houses Act, 1846), s. 24 ...	35
c. 95 (County Courts Act, 1846), s. 58 ...	526
10 & 11 Vict. c. 17 (Waterworks Clauses Act, 1847), s. 44 ...	239
c. 15 (Gasworks Clauses Act, 1847), s. 14 ...	239
11 & 12 Vict. c. 43 (Summary Jurisdiction Act, 1848), s. 34 ...	529
12 & 13 Vict. c. 26 (Leases Act, 1849) ...	57, 58
ss. 2, 3 ...	57
ss. 4, 5, 7 ...	58
49 (School Sites Act, 1849), s. 1 ...	213
c. 92 (Cruelty to Animals Act, 1849), s. 5 ...	267
13 & 14 Vict. c. 17 (Leases Act, 1850), ss. 2, 3 ...	57
14 & 15 Vict. c. 25 (Landlord and Tenant Act, 1851) ...	51, 213
s. 1 ...	226, 498
s. 2 ...	235, 236, 237
s. 3 ...	489
c. 42 (Crown Lands Act, 1851)—	
s. 2 ...	172
s. 6 ...	33
c. 99 (Evidence Act, 1851), s. 6 ...	183
c. 104 (Episcopal and Capitular Estates Act, 1851), s. 9 ...	31

	PAGE
15 & 16 Vict. c. 28 (Commissioners of Works Act, 1852)	34
c. 62 (Crown Lands Act, 1852), s. 7	33
c. 76 (Common Law Procedure Act, 1852)—	
s. 209	525
s. 210	466, 470, 476
s. 211	476
ss. 213, 214	523
c. 79 (Inclosure Act, 1852), s. 13	527
16 & 17 Vict. c. 34 (Income Tax Act, 1853)—	
s. 35	202
s. 40	201
c. 56 (Crown Lands Act, 1853), s. 6	33
c. 137 (Charitable Trusts Act, 1853)	37
ss. 21, 26, 48, 62	39
17 & 18 Vict. c. 32 (Church Building Act, 1854), s. 1	213
c. 60 (Cruelty to Animals Act, 1854), s. 1	267
18 & 19 Vict. c. 120 (Metropolitan Management Act, 1855) ...	366, 368
ss. 73, 105	203
c. 122 (Metropolitan Building Act, 1855)... ..	360
c. 124 (Charitable Trusts Act, 1855)—	
s. 15	39
s. 16	40
s. 29	39
s. 38	40
s. 39	41
s. 47	39
s. 48	41
s. 49	39
19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856), s. 5 ...	223
c. 108 (County Courts Act, 1856), s. 50	526
c. 120 (Settled Estates Act, 1856), s. 35	26
20 & 21 Vict. c. 81 (Burial Act, 1857), s. 24	39
21 & 22 Vict. c. 27 (Chancery Amendment Act, 1858), s. 2	116
c. 44 (University and Colleges Estates Act, 1858)	32
c. 57 (Ecclesiastical Leasing Act, 1858)—	
s. 1	30
s. 9	31
c. 73 (Stipendiary Magistrates Act, 1858), s. 1	247, 529
c. 95 (Court of Probate Act, 1858), s. 19	61
22 & 23 Vict. c. 35 (Law of Property Amendment Act, 1859)—	
s. 1	397, 472
s. 2	397
s. 3	417
ss. 4—6... ..	477
s. 7	360
s. 12	58, 179
s. 21	400
s. 27	422
23 & 24 Vict. c. 27 (Refreshment Houses Act, 1860), s. 44	336
c. 38 (Law of Property Amendment Act, 1860), s. 6	472
c. 59 (Universities and Colleges Estates Act, 1860)	32
c. 124 (Ecclesiastical Commissioners Act, 1860), s. 8	31
c. 126 (Common Law Procedure Act, 1860)—	
s. 1	476
s. 2	477
c. 136 (Charitable Trusts Act, 1860), s. 13	527
c. 154 (Landlord and Tenant Law Amendment Act, Ireland, 1860)	152, 213
s. 4	145
24 & 25 Vict. c. 10 (Admiralty Courts Act, 1861), s. 16	298
c. 21 (Revenue (No. 1) Act, 1861)... ..	71
s. 2	326

	PAGE
34 & 35 Vict. c. 79 (Lodgers' Goods Protection Act, 1871), s. 4	241
35 & 36 Vict. c. 27 (Elementary Education Act Amendment Act, 1872), s. 1	35
c. 50 (Railway Rolling Stock Protection Act, 1872) ...	239
c. 92 (Parish Constables Act, 1872), s. 13 ...	270
36 & 37 Vict. c. 36 (Crown Lands Act, 1873), s. 4 ...	33
c. 61 (Crown Private Estates Act, 1873) ...	33
c. 66 (Judicature Act, 1873)— s. 16	17
s. 24 (7)... ..	116
s. 25 (4)... ..	453
s. 25 (5)... ..	524
37 & 38 Vict. c. 42 (Building Societies Act, 1874), s. 37 ...	38
c. 49 (Licensing Act, 1874), s. 13 ...	339
c. 54 (Rating Act, 1874) ...	361
c. 57 (Real Property Limitation Act, 1874), s. 1 ...	253, 307, 519
c. 62 (Infants' Relief Act, 1874), s. 2 ...	8, 11
c. 78 (Vendor and Purchaser Act, 1874), s. 2 ...	111, 398
c. 96 (Statute Law Revision Act, 1874 (No. 2))...	29
38 & 39 Vict. c. 55 (Public Health Act, 1875)— s. 4	203
s. 6	36
ss. 27, 29, 51	35
s. 94	367
s. 104	203, 261, 364
s. 150	366
ss. 175, 177	35
s. 211	362
s. 214	203, 204, 361
s. 226	203, 364
s. 257	368
c. 66 (Statute Law Revision Act, 1875) ...	239
c. 77 (Judicature Act, 1875), s. 10... ..	302
c. 87 (Land Transfer Act, 1875) ...	182, 401
c. 92 (Agricultural Holdings Act, 1875) ...	502
40 & 41 Vict. c. 18 (Settled Estates Act, 1877) ...	3, 5, 11, 15, 47
s. 2	50, 51
s. 4	19, 51, 52, 176
s. 6	51
s. 7	52
s. 8	51
s. 9	50
ss. 10—13	52
ss. 23—32	52
ss. 39—41	52
s. 44	51
s. 46	14, 17, 18, 43, 50
s. 47	18, 50
s. 48	50, 51
s. 49	5, 13
ss. 50—52	19
s. 56	52
s. 57	19, 50
41 & 42 Vict. c. 31 (Bills of Sale Act, 1878) ...	83, 221, 224
s. 4	244
s. 6	84, 244
43 & 44 Vict. c. 46 (Universities and Colleges Estates Act, 1880) ...	32
c. 47 (Ground Game Act, 1880)— ss. 1, 2, 5, 8	381
ss. 3, 6	382

	PAGE
44 & 45 Vict. c. 41 (Conveyancing Act, 1881)—	
s. 2 (ii)	5
s. 3	398
s. 10	67, 165, 197, 225, 416, 453
s. 11	416
s. 12	161, 417
s. 13	111
s. 14	164, 360, 472—476
s. 18	66, 67, 176, 196, 197, 225
s. 24	226
s. 30	62
s. 40	21
s. 41	5
s. 46	72
s. 47	195
s. 50	400
s. 67	474
s. 70 (1) (2)	52
c. 44 (Solicitors' Remuneration Act, 1881)	184
c. 58 (Army Act, 1881), s. 141	3
45 & 46 Vict. c. 30 (Baths and Wash-houses Act, 1882), s. 3	35
c. 38 (Settled Land Act, 1882)	3, 11, 15
s. 2 (1)	44
s. 2 (3)	4, 44
s. 2 (5)	43
s. 2 (6)	43, 64
s. 2 (7)	43
s. 2 (8)	45
s. 2 (10)	4, 45, 47, 48
s. 4	398
s. 6	43
s. 7	44, 176
s. 8	47
ss. 9—11	48
s. 12	47
s. 13	46
s. 14	48
s. 16	47
s. 17	48
s. 20	44
s. 25 (xix)	48
s. 31	47
s. 38	45
s. 42	45
s. 44	45
s. 45	5, 45, 46
s. 50 (3)	70
ss. 53, 54	44
s. 56	5, 47, 50
s. 57	47
s. 58	4, 43, 48, 49, 100
s. 59	4, 13
s. 60	4, 5, 13
s. 61	18
s. 62	13, 14
s. 63	47, 49
c. 39 (Conveyancing Act, 1882)—	
s. 3	112
s. 7	17
s. 10	49
c. 43 (Bills of Sale Act, 1882)	83, 221, 224

	PAGE
45 & 46 Vict. c. 50 (Municipal Corporations Act, 1882)—	
s. 6	34
s. 108	34
ss. 109—111	35
c. 56 (Electric Lighting Act, 1882), s. 25...	239
c. 75 (Married Women's Property Act, 1882) ...	14, 16, 19
s. 1	16, 21, 227
s. 2	16, 227
s. 5	16, 227
ss. 19	227
ss. 24	21
c. 80 (Allotments Extension Act, 1882) ...	36, 41
s. 12	527
46 & 47 Vict. c. 18 (Municipal Corporations Act, 1883), s. 8 ...	41
c. 49 (Statute Law Revision Act, 1883) ...	116
c. 52 (Bankruptcy Act, 1883)—	
s. 30	412
s. 42	299
s. 43	300
s. 44	73
s. 54	73, 423
s. 55	424—428, 493
s. 56	73
s. 82	423
ss. 122, 125	300
s. 168	423
c. 61 (Agricultural Holdings Act, 1883) ...	327
s. 1	502
ss. 2, 3	504
s. 4	505
s. 5	502
s. 6	507
ss. 7—11	508
ss. 12—27	509
s. 28	504
ss. 29—32	509
s. 33	435
s. 34	482, 492
s. 41	231, 442
s. 42	509
s. 43	45
s. 44	253
s. 45	238, 240, 273
s. 46	254, 289
s. 47	205, 509
s. 53	502
s. 54	253, 273, 435, 502
s. 55	505
s. 56	506
s. 57	505
s. 59	506
s. 61	502, 506, 509, 512
s. 62	502
Schedule I.	502
47 & 48 Vict. c. 18 (Settled Land Act, 1884)—	
s. 4	45
s. 5 (1) (3)	45
s. 6 (1)	47, 50
s. 7	50
s. 8	49
c. 54 (Yorkshire Registries Act, 1884) ...	181, 400
s. 6	179

							PAGE
48 & 49 Vict.	c. 26	(Yorkshire Registries Act, 1885)	...	...	...	...	400
	c. 72	(Housing of the Working Classes Act, 1885), s. 12	...	...	...	...	331
	c. 79	(Crown Lands Act, 1885), s. 3	...	...	...	...	33
49 & 50 Vict.	c. 27	(Guardianship of Infants Act, 1886)	...	...	...	...	9
	c. 54	(Extraordinary Tithe Redemption Act, 1886)	...	...	...	...	204, 205
	s. 7	...	...	...	...	...	205
50 & 51 Vict.	c. 26	(Allotments and Cottage Gardens Compensation for Crops Act, 1887)	...	...	...	...	510
	c. 48	(Allotments Act, 1887)—					
	s. 2	...	...	...	...	...	36
	s. 3	...	...	...	...	...	510
	s. 3 (7)	...	...	...	...	...	37
	s. 7	...	...	...	...	...	486
	s. 7 (3) (4)	...	...	...	...	...	36
	s. 7 (6)	...	...	...	...	...	37
	s. 8	...	...	...	...	...	510, 527
51 & 52 Vict.	c. 21	(Law of Distress Amendment Act, 1888)—					
	s. 4	...	...	...	...	...	238
	s. 5	...	...	...	...	...	274, 278
	s. 6	...	...	...	...	...	276, 279
	s. 7	...	...	...	...	...	254
	c. 42	(Mortmain and Charitable Uses Act, 1888)...	...	...	...	...	24
	s. 4	...	...	...	...	...	41, 42
	s. 5	...	...	...	...	...	42
	s. 6	...	...	...	...	...	38
	s. 10	...	...	...	...	...	38, 42
	c. 43	(County Courts Act, 1888)—					
	s. 49	...	...	...	...	...	297
	ss. 59, 60	...	...	...	...	...	526
	s. 67 (4)...	...	...	...	...	...	109
	ss. 108, 109	...	...	...	...	...	285
	s. 120	...	...	...	...	...	288, 509, 527
	s. 124	...	...	...	...	...	509
	ss. 134—136	...	...	...	...	...	285
	s. 137	...	...	...	...	...	287
	s. 138	...	...	...	...	...	525
	s. 139	...	...	...	...	...	526
	s. 140	...	...	...	...	...	527
	s. 147	...	...	...	...	...	239
	s. 160	...	...	...	...	...	296
	s. 184	...	...	...	...	...	17
	s. 186	...	...	...	...	...	526
	c. 51	(Land Charges Registration and Searches Act, 1888)	...	...	...	...	70, 434
	s. 4	...	...	...	...	...	509
	c. 62	(Preferential Debts in Bankruptcy Act, 1888),					
	s. 1	...	...	...	...	...	301, 304
52 & 53 Vict.	c. 36	(Settled Land Act, 1889), s. 2	...	...	...	...	47
	c. 47	(Palatine Court of Durham Act, 1889), s. 10	...	...	...	...	51
	c. 49	(Arbitration Act, 1889), s. 12	...	...	...	...	507
	c. 63	(Interpretation Act, 1889)	...	...	...	...	4, 44
53 Vict.	c. 5	(Lunacy Act, 1890)	...	...	...	...	11
	s. 108	...	...	...	...	...	11, 13
	s. 116	...	...	...	...	...	12, 13
	s. 120	...	...	...	...	...	11, 12, 13
	s. 121	...	...	...	...	...	12
	s. 122	...	...	...	...	...	11, 12
	s. 123	...	...	...	...	...	12
	s. 124	...	...	...	...	...	13
	s. 341	...	...	...	...	...	12
53 & 54 Vict.	c. 16	(Working Classes Dwellings Act, 1890)	...	...	...	...	41
	c. 51	(Statute Law Revision (No. 2) Act, 1890), s. 3	...	...	...	...	120

	PAGE
53 & 54 Vict. c. 57 (Tenants' Compensation Act, 1890) ...	511
s. 3 ...	509
c. 63 (Companies (Winding-up) Act, 1890) ...	73
c. 65 (Allotments Act, 1890) ...	37
c. 69 (Settled Land Act, 1890)—	
s. 7 ...	46
s. 8 ...	48
s. 10 ...	44, 70
ss. 16, 18 ...	45
c. 70 (Housing of the Working Classes Act, 1890)—	
s. 12 ...	35
s. 57 (2)...	35
s. 74 ...	45
c. 71 (Bankruptcy Act, 1890)—	
s. 13 ...	424, 427
s. 28 ...	300
54 Vict. c. 8 (Tithe Act, 1891)—	
s. 1 ...	205, 363
s. 2 ...	204
ss. 6, 9 ...	205
s. 10 ...	204, 205
54 & 55 Vict. c. 27 (Lunacy Act, 1891), s. 27 (1) ...	12
c. 39 (Stamp Act, 1891) ...	170, 285
ss. 4, 5 ...	173
ss. 7, 8 ...	170
ss. 11 ...	117, 177
ss. 14, 15 ...	175
s. 24 ...	275
s. 59 ...	399
s. 72 ...	118
s. 75 ...	117
s. 78 ...	170, 171, 175
Schedule... ..	275, 454
c. 64 (Land Registry (Middlesex Deeds) Act, 1891) ...	181
c. 75 (Factory and Workshop Act, 1891), s. 7 ...	368
c. 76 (Public Health (London) Act, 1891), s. 121 ...	361, 364
55 Vict. c. 11 (Mortmain and Charitable Uses (Amendment) Act, 1892), ss. 1, 2 ...	38
55 & 56 Vict. c. 13 (Conveyancing Act, 1892)—	
s. 2 ...	475
s. 3 ...	396
s. 4 ...	472
s. 5 ...	475
c. 31 (Small Holdings Act, 1892)—	
ss. 2, 4 ...	37
s. 12 ...	37, 45
s. 16 ...	38
c. 53 (Public Libraries Act, 1892), s. 11 ...	35
56 & 57 Vict. c. 39 (Industrial and Provident Societies Act, 1893), s. 36 ...	38
c. 53 (Trustee Act, 1893), s. 47 ...	45
c. 63 (Married Women's Property Act, 1893), s. 1 ...	17
c. 73 (Local Government Act, 1894)—	
s. 5 (2) ...	36
s. 6 (1) ...	36
s. 8 (2) ...	36, 37
s. 10 ...	37, 509
s. 19 ...	36
s. 19 (10) ...	37
s. 21 ...	35, 36
s. 52 (4, 5) ...	36
s. 67 ...	36

	PAGE
57 & 58 Vict. c. 43 (Crown Lands Act, 1894)	33
c. 46 (Copyhold Act, 1894), ss. 8, 17, 27	204
c. cxxiii. (London Building Act, 1894)	360
58 & 59 Vict. c. 16 (Finance Act, 1895), s. 15	175
c. 24 (Law of Distress Amendment Act, 1895)—	
ss. 1, 2	254
s. 4	289
c. 27 (Market Gardeners' Compensation Act, 1895)—	
s. 3 486, 490, 492, 503, 506, 511	511
s. 4	512
s. 6	511
59 & 60 Vict. c. 16 (Agricultural Rates Act, 1896)	361
c. 25 (Friendly Societies Act, 1896), s. 47	38
60 & 61 Vict. c. 65 (Land Transfer Act, 1897)	182, 401
s. 1	61
s. 2	61
s. 25	62
61 & 62 Vict. c. 48 (Benefices Act, 1898)	2
c. 55 (Universities and Colleges Estates Act, 1898)	32

INDEX OF FORMS.

	PAGE
AGRICULTURAL HOLDINGS ACT, 1883,	
Consent by landlord to improvements... ..	504
Notice by tenant before removal of agricultural fixtures	489
election by landlord to purchase	489
by tenant of claim to compensation	507
counter notice by landlord	508
by tenant of intention to execute improvements	504
CONSENT to assignment of lease	394
DEMAND of possession prior to claim for double value	
before expiration of tenancy	515
after expiration of tenancy	516
DISTRESS,	
Appraisement, memorandum of	275
Consent by tenant for bailiff to remain in possession	280
Declaration by lodger to prevent distress	243
Inventory and notice before sale	270
Request for extension of period for replevy	276
removal of goods to place of sale... ..	278
Warrant of distress	255
NOTICE before forfeiture (under Conveyancing Act, 1881)	474
by landlord of intention to recover possession before justices	
under 1 & 2 Vict. c. 74	528
NOTICE by landlord to sheriff in possession under execution that rent	
is due	293
by lessee to determine tenancy for optional term of years	451
to quit by landlord	442
by tenant	442

ABBREVIATIONS.

USED IN THE CITATION OF CASES AND TEXT BOOKS.



A. & E. ...	...	.. Adolphus & Ellis's Reports.
Ale. & Napier ...	...	... Alcock & Napier's Reports.
Aleyn ...	...	... Aleyn's Reports.
Ambl. ...	...	... Ambler's Reports.
Anstr. ...	...	... Anstruther's Reports.
App. Cas. ...	...	... Law Reports, House of Lords & Privy Council Cases (1875—1890).
1891, A. C. ...	...	... Law Reports, 1891, House of Lords & Privy Council Cases, from 1891.
Arn. ...	...	... Arnold's Reports.
Atk. ...	...	... Atkyn's Reports.
Bac. Abr. ...	...	... Bacon's Abridgment, tit. <i>Leases</i> , 7th Edit.
Ball & B. ...	...	... Ball & Beatty's Reports.
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THE LAW

OF

LANDLORD AND TENANT.

CHAPTER I.

REQUISITES TO THE CREATION OF THE RELATION OF LANDLORD AND TENANT.

	PAGE
SECT. I. PROPERTY CAPABLE OF BEING LET	2
SECT. II. PERSONS CAPABLE OF MAKING AND TAKING LEASES	3
(1) Restrictions arising from disability	3
i. Infants	3
(a) Leases by or on behalf of infants	3
(b) Leases to infants	9
ii. Lunatics	11
iii. Married women	14
iv. Aliens	22
v. Convicts	22
vi. Corporations	23
(a) Ecclesiastical corporations	25
(b) Universities and colleges	32
(c) The Crown	33
(d) Municipal corporations, &c.	34
(e) Building societies, &c.	38
(f) Companies	38
vii. Trustees for charitable uses	39
(a) Leases by trustees	39
(b) Leases to trustees	41
(2) Restrictions arising from limited interest	43
i. Tenants in tail	43
ii. Tenants for life	43
iii. Leases by the Court	51
iv. Leases under powers	52
v. Trustees and personal representatives	58
vi. Co-owners	63
vii. Copyholders	64
viii. Mortgagor and mortgagee	66
ix. Judgment creditors	70
x. Agents	70
xi. Receivers, &c.	72
(3) Restrictions arising from confidential relations	73
(4) Leases by estoppel	74

	PAGE
SECT. III. AN ACTUAL LETTING, OR AN AGREEMENT CAPABLE	
OF SPECIFIC ENFORCEMENT	79
Agreements distinguished from leases	79
Present effect of agreement	81
Attornment	82
SECT. IV. EXCLUSIVE POSSESSION	84
Licences distinguished from leases	84
Occupation by a servant	87
Lodgers	88

SECT. I.—PROPERTY CAPABLE OF BEING LET.

General rule.

IN accordance with the rule that whatever may be granted for ever may be granted for a time, leases may be made of all kinds of interests and possessions (*a*); not only of corporeal hereditaments, as land or mines therein (*b*), or the surface, vesture, or herbage thereof (*c*), or buildings thereon or parts of such buildings, such as stalls or boxes at a theatre (*d*); but also of incorporeal hereditaments, such as a right of common (*e*), a manor (*f*), a ferry (*g*), a fair or market (*h*), (formerly) an advowson (*i*) — but a lease of an advowson is now prohibited by the Benefices Act, 1898 (*k*) — a several fishery (*l*), estovers (*m*), tithes (*n*), tolls (*o*), and rights of shooting and sporting (*p*): of easements, such as a right of way (*q*); also of live stock (*r*),

(*a*) Bac. Abr. (A.) 639.

(*b*) See *Jegon v. Vivian*, 1865, L. R. 1 C. P. p. 18; *G. W. Ry. v. Smith*, 1876, 24 W. R. 443.

(*c*) Co. Litt. 47 a; *cf. Masters v. Green*, 1888, 20 Q. B. D. 807, where "the exclusive right to feed the grass" on certain land was granted; and see *Cattle v. Gamble*, 1838, 5 Bing. N. C. 46.

(*d*) *Leader v. Moody*, 1875, 20 Eq. 145, 152.

(*e*) *Sury v. Brown*, 1623, Latch. 99. See as to leases of wastes and commons, 13 Geo. 3, c. 81, s. 15, *infra*, p. 64, note (*f*).

(*f*) *Gibson v. Searl*, 1606, Cro. Jac. 84, 176.

(*g*) *R. v. Nicholson*, 1810, 12 East, 330; *Peter v. Kendal*, 1827, 6 B. & C. 703.

(*h*) *Bridgland v. Shapter*, 1839, 5 M. & W. 375.

(*i*) *Bousher v. Morgan*, 1794, 2 Anst. 404; *Cor v. Brain*, 1810, 3 Taunt. 95. See *Kensley v. Langham*, 1735, Cas. temp. Talbot, 144.

(*k*) 61 & 62 Vict. c. 48; see sect. 1 (1) (*b*).

(*l*) *Somerset v. Fogwell*, 1826, 5 B. & C. 875. (*m*) *Shep. Touch.* 222.

(*n*) *Brewer v. Hill*, 1794, 2 Anst. 413; *Walker v. Wakeman*, 1676, 1 Vent. 294, 2 Lev. 150, 3 Keb. 595. See as to leases of tithes by ecclesiastical persons, 5 Geo. 3, c. 17.

(*o*) *Bridgland v. Shapter*, 1839, 5 M. & W. 375; *Shepherd v. Hodsman*, 1852, 18 Q. B. 316. See *Harris v. Morrice*, 1842, 10 M. & W. 260.

(*p*) *Gearns v. Baker*, 1875, 10 Ch. 355; *West v. Houghton*, 1879, 4 C. P. D. 197; *Bird v. G. E. Ry. Co.*, 1865, 19 C. B. N. S. 268.

(*q*) *Newmarch v. Brandling*, 1818, 3 Swanst. 99.

(*r*) *Spencer's Case*, 1583, 5 Rep. 16 b; *Tudgay v. Sampson*, 1874, 30 L. T. 262; *Holme v. Brunskill*, 1877, 3 Q. B. D. 495; *infra*, p. 377.

and other goods and chattels (*s*), as railway rolling stock (*t*).

Such offices as do not concern the administration of justice, but only require skill and diligence, may, it is said, be granted for years: but offices to which a trust is annexed, or which concern the administration of justice (*u*), and dignities and honours (*x*), cannot be so granted. All alienations of pensions granted by the Crown for military services (including, therefore, leases of such pensions) are void (*y*).

SECT. II.—PERSONS CAPABLE OF MAKING AND TAKING LEASES.

A tenant in fee simple with an indefeasible estate has, as part of his rights of ownership, an absolute power of granting leases upon such terms as he pleases. A tenant in fee simple with an executory limitation over, on failure of his issue or in any other event, has the powers of leasing conferred on a tenant for life by the S. L. A. 1882 (*z*).

Leases for limited terms, and subject to the observance of conditions and restrictions, may be granted or accepted by, or on behalf of, persons ordinarily unable to contract, or possessing only a limited interest in the demised premises.

(1) RESTRICTIONS ARISING FROM DISABILITY.

1. INFANTS.

(a) *Leases by or on behalf of Infants.*

Leases of the property of infants may be made under the Settled Land Act, 1882, the Settled Estates Act, 1877, and the Infants' Property Act, 1830.

(*s*) Bac. Abr. (A.) 639; see *Sheffield Waggon Co. v. Stratton*, 1878, 48 L. J. Q. B. 35; though it was questioned by Collins, J., in *Jones v. Comm. of In. Rev.* (1895, 1 Q. B. 484), whether there can be, strictly speaking, a lease of chattels.

(*t*) *Att.-Gen. v. G. E. Ry. Co.*, 1879, 11 C. D. 449; *Lancashire Waggon Co. v. Nuttall*, 1879, 40 L. T. 291.

(*u*) Bac. Abr. (A.) 639—641; *Reynel's Case*, 1612, 9 Rep. p. 96 b; *Howard v. Wood*, 1679, 2 Lev. 245. See also 5 & 6 Edw. 6, ss. 2, 3.

(*x*) Bac. Abr. (A.) 642; Co. Litt. 16 b; *Reynel's Case*, 1612, 9 Rep. p. 97 b.

(*y*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 141; *Lloyd v. Cheetham*, 1861, 3 Giff. 171. Assignments of half-pay were void at common law: *Flarty v. Odium*, 1790, 3 T. R. 681; *Lidderdale v. D. of Montrose*, 1791, 4 T. R. 248.

(*z*) 45 & 46 Vict. c. 38, *infra*, p. 43.

Leases under
the Settled
Land Act,
1882 (*a*),
s. 59.
Sect. 60.

Where an infant is in his own right seised of or entitled in possession to land of any tenure (*b*), then for the purposes of the Act the land is settled land, and the infant is deemed tenant for life thereof. Where a tenant for life, or a person having the powers of a tenant for life under the Act (*c*), is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under the Act, the powers of a tenant for life under the Act may be exercised on his behalf, (1) by the trustees of the settlement for the purposes of the Act (*d*), or, if there are none, (2) by such person and in such manner as the Court, on the application of the guardian or next friend of the infant, either generally or in a particular instance orders (*e*). Thus whether the infant is absolutely entitled to freehold, copyhold, or leasehold hereditaments, or whether he is tenant for life or falls within any of the classes of owners who have the powers of a tenant for life under the Act (*f*), the powers of leasing (*g*), and of accepting surrenders and granting new leases (*h*), contained in the Settled Land Acts may be exercised on his behalf. Where an infant is entitled in fee, subject to an executory limitation over in the event of death under twenty-one, he falls within sect. 58 (1) (ii) of the S. L. A. 1882, and the powers of a tenant for life can be exercised on his behalf under sect. 60 (*i*); but where he is only contingently entitled the Act does not apply (*k*).

(*a*) 45 & 46 Vict. c. 38.

(*b*) "Land" when used in an Act of Parliament passed after 1850 includes "messuages, tenements, and hereditaments, houses and buildings of any tenure:" Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3. In the present Act the word "land" also includes incorporeal hereditaments and an undivided share in land: sect. 2, sub-sect. (10) (*i*).

(*c*) *Infra*, p. 48.

(*d*) See *infra*, p. 45, note (*g*).

(*e*) The application is made by summons in Chambers: S. L. A. Rules, 1882, r. 2.

(*f*) Where the infant has a limited interest the power to lease conferred by the Act extends only to the estate or interest which is the subject of the settlement under which he claims, and the lease is only binding on persons claiming under such settlement: S. L. A. 1882, s. 2 (3).

(*g*) *Infra*, p. 44.

(*h*) *Infra*, p. 46.

(*i*) *Re James's S. E.*, 1884, 32 W. R. 898; *Re Morgan*, 1883, 24 C. D. 114.

(*k*) *Re Horne's S. E.*, 1888, 39 C. D. 84; and as to sect. 59 see *Re Wells*, 1883, 31 W. R. 764; *Re Greenville Estate*, 1883, 11 L. R. Ir. 138; *Re Powell*, W. N. 1884, 67.

Where by the settlement a power of leasing is vested in any other person than the tenant for life, and the tenant for life is an infant, the consent required under sect. 56 (*l*) must be given by the trustees of the settlement (if any) (*m*) ; otherwise by a person appointed by the Court under sect. 60, but in this latter case the notice required by sect. 45 need not be given (*n*).

The Settled Estates Act, 1877 (*o*), enables a tenant for life, and certain other classes of limited owners, when entitled in possession, to grant leases for twenty-one years without application to the Court, and it confers a more extensive power of leasing with the sanction of the Court (*p*). Under sect. 49 all powers given by the Act, and all applications to the Court, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under the Act may be given to, guardians on behalf of infants (*q*), save that in the case of an infant tenant in tail no application to the Court or consent to or notification respecting any application is to be made by any guardian without the special direction of the Court. The scope of the Act was extended by sect. 41 of the Conveyancing Act, 1881 (*r*), which enacts that where a person in his own right, seised of or entitled to land (*s*) for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877. The section applies where an infant is entitled contingently only, *e.g.* on attaining twenty-one (*t*).

Leases under the Settled Estates Act, 1877.

Sect. 49.

Where an infant is seised or possessed of or entitled to any land in fee or in tail (*u*), or to any leasehold land for

Leases under the Infants' Property Act, 1830, s. 17.

(*l*) *Infra*, p. 47.

(*m*) *Re D. of Newcastle's Estates*, 1883, 24 C. D. 129.

(*n*) *Re Countess of Dudley's Contract*, 1887, 35 C. D. 338.

(*o*) 40 & 41 Vict. c. 18.

(*p*) *Infra*, pp. 50, 51.

(*q*) It has been held that a special guardian must be appointed by the Court to consent on behalf of an infant incumbrancer : *Re Cuddick*, 1859, 7 W. R. 334 ; *Re James*, 1868, 5 Eq. 334. See *Re Marquis of Salisbury*, 1876, 2 C. D. p. 39.

(*r*) 44 & 45 Vict. c. 41.

(*s*) "Land" in this Act "includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses and other buildings; also an undivided share in land : " sect. 2 (ii).

(*t*) *Re Liddell*, 1883, 31 W. R. 238 ; *Re Sparrow's Estate*, 1892, 1 Ch. 412.

(*u*) *Re Spenser's Estates*, 1867, 37 L. J. Ch. 18 ; *Re Letchford*, 1876,

an absolute interest, the Court can sanction leases to extend beyond majority under the Infants' Property Act, 1830 (*x*). And where, in the absence of disability, a renewal of a lease might be compelled, the infant, or his guardian in his name, may, by the direction of the Court, accept a surrender and grant a new lease (*y*). For practical purposes the Act has been superseded by the other Acts mentioned above (*z*).

The sovereign may, during minority, grant a valid lease (*a*). An infant above the age of fifteen, seised in fee of lands subject to the custom of gavelkind, may make a lease of such lands for life, by livery of seisin made in person and not by attorney (*b*).

A lease granted by an infant, otherwise than under this prerogative, or custom, or the provisions of the above-mentioned statutes, is, as a general rule, not void, but voidable, and it may be avoided by him on attaining his majority (*c*), or by his heir, if he dies before that event (*d*); though if the lease is granted fraudulently by the infant, and a fine has been paid for it, the lease will only be set aside on the terms of the infant repaying the fine (*e*). A lease arranged before the coming of age, but executed afterwards, will be set aside if the lessor had no opportunity of applying his adult judgment (*f*).

Where, however, the lease is necessarily to the prejudice of the infant, it may be that it is void (*g*); hence it has been

2 C. D. 719; *Re Clark*, 1866, 1 Ch. 292. Cf. *Re Evans*, 1835, 2 My. & K. 318; *Ex parte Legh*, 1846, 15 Sim. 445.

(*x*) 11 Geo. 4 & 1 Will. 4, c. 65; *Anstey v. Hobson*, 1853, 1 Sm. & G. 505. As to setting aside a lease so granted, see *Seaton v. Staniland*, 1862, 4 Giff. 61.

(*y*) Sect. 16. See sects. 20 and 21 as to payment and application of fines, and sect. 31 as to validity of surrenders, &c., made under the Act.

(*z*) For the practice under the Act of 1830, see Seton, 5th ed. pp. 873—877; R. S. C. Ord. 55, r. 2 (9).

(*a*) *Case of the Duchy of Lancaster*, 1562, Plowd. 217. See *Alcock v. Cooke*, 1829, 5 Bing. p. 352.

(*b*) Robinson on Gavelkind, 5th ed. 166. A feoffment made under a custom by an infant is excepted from 8 & 9 Vict. c. 106, s. 3, and need not therefore be evidenced by deed.

(*c*) Co. Litt. 308 a; *Zouch v. Parsons*, 1765, 3 Burr. p. 1806; *Slator v. Brady*, 1863, 14 Ir. C. L. R. 61; *Slator v. Trimble*, 1861, *ib.* 342, 351; Bac. Abr. (B.) 643; 1 Rol. Abr. 729 D, pl. 2; *Williams v. Tapscott*, 1892, 8 T. L. R. 241. (*d*) Co. Litt. 45 b; 4 Cruise's Digest, 69.

(*e*) *Esron v. Nicholas*, 1733, 1 De G. & S. 118. In general, it seems, a fine would not be repayable: see cases cited *infra*, p. 11.

(*f*) *Say v. Barwick*, 1812, 1 V. & B. 195. Cf. *Aylward v. Kearney*, 1814, 2 Ball & B., p. 478. (*g*) See Simpson on Infants, 2nd ed. p. 9.

doubted whether a lease reserving no rent, or a nominal rent merely, is not absolutely void, because then, as it is said, there is no semblance of benefit to the infant (*h*). But the test is not conclusive, for a lease without rent to try title under the old practice in ejectment was allowed to be beneficial (*i*). On the other hand, it has been said that the infant cannot avoid a lease which is for his benefit (*k*), but this again seems to be incorrect. In all cases the infant has at least an election whether to avoid the lease or no (*l*). Assuming that a lease by an infant may be void, it seems that, in order to prevent this result, it is not essential that the rent reserved should be the best (*m*).

If there is no rent reserved, the infant can, it seems, get rid of the lease during minority (*n*), but otherwise not till he attains twenty-one (*o*); and if the lessee is then in possession, the lessor who desires to avoid the lease must manifest his intention by some act of notoriety, as ejectment, entry, demand of possession, or the like; or must, at the least, give notice (*p*). The execution by him of a new lease of the same premises to another person will not necessarily divest the estate created by the former demise (*q*). Moreover, the avoidance must take place within a reasonable time of the infant attaining twenty-one, and in considering what is a reasonable time, the question whether or no he was aware of his right to repudiate is not to be taken into account (*r*).

Avoidance of lease.

If the lessor, after attaining his majority, accepts rent, Confirmation.

(*h*) *Humphreston's Case*, 1574, 2 Leon. 216; *Lane v. Cowper*, 1575, Moore, p. 105. See the observations of Lord Ellenborough in *Baylis v. Dineley*, 1815, 3 M. & S. p. 481.

(*i*) *Rumes v. Machin*, Noy, 130; *Zouch v. Parsons*, *supra*; Bac. Abr. (B.) 643.

(*k*) Per Buller, J., in *Maldon v. White*, 1787, 2 T. R. p. 161.

(*l*) *Ketscy's Case*, 1614, 1 Brownlow, 120. For other references to this case, see *infra*, p. 10.

(*m*) *Slator v. Brady*, 1863, 14 Ir. C. L. R. p. 65.

(*n*) *Slator v. Trimble*, 1861, 14 Ir. C. L. R. p. 357.

(*o*) Bac. Abr. (B.) 643; *Slator v. Trimble*, 1861, 14 Ir. C. L. R. pp. 352, 356, per O'Brien and Hayes, JJ. But see remarks of Parke, B., in *North Western Ry. Co. v. McMichael*, 1850, 5 Ex. p. 124.

(*p*) *Slator v. Brady*, 1863, 14 Ir. C. L. R. p. 66.

(*q*) *Slator v. Brady*, 1863, *ib.* p. 65. But see *Inman v. Inman*, 1873, 15 Eq. 260.

(*r*) *Carter v. Silber*, 1892, 2 Ch. 278, see pp. 284, 288; *aff. sub nom. Edwards v. Carter*, 1893, A. C. 360.

whether (it would seem) due before or after that event (*s*), or otherwise either verbally (*t*), or by deed (*u*), recognizes the lease as subsisting, he formerly could not, and, notwithstanding the Infants' Relief Act, 1874 (*x*), it would seem that he still cannot, subsequently avoid it, and such confirmation relates back to the date of the lease (*y*).

The lease of an infant, to be good, must be his personal act. If he appoints an agent to make the lease, it does not bind the infant, nor is the infant's ratification of such lease binding (*z*).

The lessor may sue for rent during his infancy (*a*), but if he avoids the lease on attaining twenty-one he cannot recover arrears of rent as rent due under the lease. Apparently he must claim them as damages in an action of trespass (*b*).

The lessee can in no case avoid the lease on account of the infancy of the lessor (*c*).

Of the various classes of guardians it is sufficient to mention guardians by nature and for nurture, guardians in socage, testamentary guardians, guardians by statute, and guardians appointed by the Court. Guardianship by nature and for nurture belong in the first instance to the father, the one extending to the age of twenty-one and the other to fourteen, but they give no more than the custody of the person of the infant (*d*); consequently

(*s*) *Ashfield v. Ashfield*, 1627, Sir W. Jones, 157, Noy, 92, Latch. 199; *Smith v. Low*, 1739, 1 Atk. 489; *Baylis v. Dineley*, 1815, 3 M. & S. p. 481; *Slator v. Trimble*, 1861, 14 Ir. C. L. R. p. 352.

(*t*) As by saying to the lessee, "God give you joy of it:" *Anon.*, 1588, 4 Leon. 4, c. 15.

(*u*) *E.g.* by mortgaging the land to the lessee by deed referring to the lease: *Story v. Johnson*, 1837, 2 Y. & C. Ex. 586, 607.

(*x*) 37 & 38 Vict. c. 62, s. 2. Although the section has been held to be applicable to *contracts* of every kind entered into during infancy (*Coxhead v. Mullis*, 1878, 3 C. P. D. 439), it is considered that it would not apply to a transaction which is not a mere contract, but the creation of an estate or interest; or the lessee might contend that the acts of confirmation amounted to a new contract (see *Northcote v. Doughty*, 1879, 4 C. P. D. 385).

(*y*) *Slator v. Trimble*, 1861, 14 Ir. C. L. R. p. 353.

(*z*) Per Parke, B. in *Doe v. Roberts*, 1847, 16 M. & W. p. 781.

(*a*) *Smith v. Bowin*, 1669, 1 Mod. 25.

(*b*) *Slator v. Trimble*, 1861, 14 Ir. C. L. R. p. 352.

(*c*) *Zouch v. Parsons*, 1765, 3 Burr. p. 1806; *Slator v. Brady*, 1863, 14 Ir. C. L. R. p. 66; *Forrester's Case*, 1662, 1 Sid. 41.

(*d*) *R. v. Sherrington*, 1832, 3 B. & Ad. 714.

the guardian cannot create any tenancy of the infant's lands except perhaps leases at will (*e*). Guardian in socage (*f*) has an interest as well as an authority, and can make a lease which will be good as long as the guardianship lasts—that is, till the infant attains fourteen (*g*). After the infant has attained that age, the lease so made is not void but voidable, and the infant may then (subject to the possible effect of the Infants' Relief Act, 1874 (*gg*)), by acceptance of rent or other act of confirmation, make the lease good and unavoidable (*h*). A testamentary guardian under 12 Car. 2, c. 24, has all the powers of a guardian in socage, the period of guardianship being extended to twenty-one (*i*); consequently he can lease for the minority of the ward (*k*). And the powers of guardians under the Guardianship of Infants Act, 1886 (*l*), are the same. Guardians appointed by the Court are said to be in the nature of receivers only (*m*), and they cannot grant leases without the sanction of the Court (*n*).

(*b*) *Leases to Infants.*

In cases where an infant is entitled (*o*) to any lease for life or lives or for any term of years either absolute or determinable upon the death of one or more persons or otherwise, the Court may, on the application of the infant or of his guardian or other person on his behalf, order the infant, or his guardian, or a person appointed by the Court in the place of the infant, by deed to surrender the lease and accept in its place a new lease or leases of the premises comprised in the surrendered lease for such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years

Renewal of
lease :
Infants'
Property Act,
1830 (*p*),
s. 12.

(*e*) *Pigot v. Garnish*, 1599, Cro. Eliz. 678, 734. (*f*) Litt. s. 123.

(*g*) *Eyre v. Shaftesbury*, 1722, 2 P. W. p. 122; *Wade v. Baker*, 1697, 1 Ld. Raym. 131; *R. v. Oakley*, 1809, 10 East, 491; *R. v. Sutton*, 1835, 3 A. & E. p. 613.

(*gg*) *Supra*, p. 8, note (*c*).

(*h*) Bac. Abr. (I. 9) 784.

(*i*) *Bedell v. Constable*, 1665, Vaughan, 179.

(*k*) *Shaw v. Shaw*, 1788, Vern. & Scriv. 607.

(*l*) 49 & 50 Vict. c. 27.

(*m*) Per Patteson, J., in *R. v. Sutton*, 1835, 3 A. & E. p. 608.

(*n*) Platt on Leases, I. 380. See *infra*, p. 72.

(*o*) It is sufficient if he is beneficially entitled: *Re Griffiths*, 1885, 29 C. D. 248. If he is part owner, the consent of the co-owner is required: *Betty v. Humphries*, 1875, Ir. R. 9 Eq. p. 347.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 65.

absolute as were mentioned in the surrendered lease, or otherwise as the Court shall direct. The Palatine Courts of Lancaster and Durham have jurisdiction for the above purpose in their respective localities (q).

Leases to
infants not
under statute.

Leases granted to infants may be avoided by them at majority; and if the lessee then disaffirms the lease, it has been said that he will avoid payment of the arrears of rent previously incurred (r), unless the occupation of the premises can be brought under the head of *necessaries* (s). It was held, however, in *Blake v. Concaunon* (t), upon an examination of *Ketsey's Case* (r), that, though the repudiation of the lease puts an end to the contract, the lessee remains liable for rent accruing in respect of *actual occupation* during infancy (u). On the other hand, if the lessee continues to occupy the demised premises, and does not signify his intention to avoid the lease within a reasonable time (x) after attaining his majority, he formerly became liable to pay the rent (including arrears accrued during his minority (y)), and to perform all the other obligations attached to the estate (z). The repudiation should be by express notice, unless the lessor has by his conduct waived notice (a). Where a lease devolves upon an infant by operation of law and he does not disclaim, he is liable for rent during infancy (b), and the rent may be distrained for (c).

(q) See also sects. 14, 15. As to the practice on applications under the Act, see R. S. C. Ord. 55, r. 2 (9); Seton, 5th ed. pp. 873, 874.

(r) Bac. Abr. "Infancy and Age" (I.), 376; *Ketsey's Case*, 1614, Cro. Jac. 320; S. C. *sub nom.* *Kirton v. Elliott*, 2 Bulstr. 69, 1 Brownlow, 120, 1 Roll. Abr. 731; *Lempriere v. Lange*, 1879, 12 C. D. 675.

(s) *Lowe v. Griffith*, 1835, 1 Scott, 458; *Crisp v. Churchill*, 1794, cited 1 B. & P. p. 340; *Lempriere v. Lange*, 1879, 12 C. D. 675.

(t) 1870, 4 Ir. R. C. L. 323.

(u) Cf. *E. of Buckinghamshire v. Drury*, 1761, 2 Eden, p. 72; *Mahon v. O'Farrell*, 1847, 10 Ir. L. R. 527.

(x) *Carter v. Silber*, 1892, 2 Ch. 278; aff. *sub nom.* *Edwards v. Carter*, 1893, A. C. 360. See per Dallas, J., in *Holmes v. Blogg*, 1817, 8 Taunt. p. 39; *Doe v. Smith*, 1788, 2 T. R. 436; *Dublin and Wicklow Ry. Co. v. Black*, 1852, 8 Ex. 181.

(y) *Ketsey's Case*, *supra*; Bac. Abr. (B.) 643. Cf. *Evelyn v. Chichester*, 1765, 3 Burr. 1717.

(z) *North Western Ry. Co. v. McMichael*, 1850, 5 Ex. p. 124; *Mahon v. O'Farrell*, 1847, 10 Ir. L. R. 527.

(a) *Holmes v. Blogg*, 1817, 8 Taunt. 35.

(b) *Kelly v. Coote*, 1856, 5 Ir. C. L. Rep. 469.

(c) *Conny's Case*, 1612, 9 Rep. 85 a.

Inasmuch as the liability for rent is an incident of the estate, and since, in the absence of avoidance of the lease, the estate remains vested in the lessee, it is probable that the above cases as to liability for rent still correctly state the law notwithstanding the provisions of the Infants' Relief Act, 1874 (*d*). The lessee, however, would not be directly liable on the covenants in the lease, though it would probably be open to the lessor to exercise his right of re-entry for breach of covenant. Where a contract is set aside under the Infants' Relief Act, the infant cannot recover any money actually paid under it for benefits received by him (*e*); and, generally, where an infant avoids a lease, the test whether he can recover a premium or other money paid for it depends on whether he has derived any real advantage (*f*). If, for instance, he has occupied under the lease, he cannot recover the premium (*g*); if he has got no advantage, he can (*h*). A lease obtained by an infant on a representation that he was of full age will be declared void on the application of the lessor, but he cannot both claim to have the lease declared void and to make the defendant liable for use and occupation (*i*).

II. LUNATICS.

Leases on behalf of lunatics are made or taken under the Lunacy Act, 1890. For the case of a lunatic limited owner provision is made by the Settled Land Act, 1882, and the Settled Estates Act, 1877 (*k*).

Under the Lunacy Act, 1890 (*l*), the Judge in lunacy (*m*) may authorize the committee of the estate of a lunatic (*n*):

Leases under Lunacy Act, 1890, s. 120.

(*d*) 37 & 38 Vict. c. 62. See *supra*, p. 8.

(*e*) *Valentini v. Canali*, 1889, 24 Q. B. D. 166.

(*f*) *Hamilton v. Vaughan-Sherrin, &c., Co.*, 1894, 3 Ch. 589.

(*g*) *Holmes v. Blogg*, 1818, 8 Taunt. 508. See *Wilson v. Kearse*, 1801, Peake, Add. Cas. 196; *Ex parte Taylor*, 1856, 8 D. M. & G. 254.

(*h*) *Corpe v. Overton*, 1833, 10 Bing. 252; *Everett v. Wilkins*, 1874, 29 L. T. 846.

(*i*) *Lempriere v. Lange*, 1879, 12 C. D. 675.

(*k*) *Infra*, p. 13.

(*l*) 53 & 54 Vict. c. 5. The Act does not extend to Ireland (sect. 2); for Ireland see Lunacy Regulation (Ireland) Act, 1871 (34 & 35 Vict. c. 22).

(*m*) See sect. 108.

(*n*) As to a lunatic tenant in tail, see sect. 122(1). The Court in giving directions to the committee will do what a just and reasonable owner would do: *Re Wynne*, 1872, 7 Ch. 229. As to the committee's liability if he lets without the authority of the Court, see *Re Wilkins*, 1842, 6 Jur. 308.

(1) to grant leases (*o*) of any property of the lunatic for building, agricultural, or other purposes; (2) to grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface or other land; (3) to surrender any lease and accept a new lease (*p*); and to accept a surrender of any lease and grant a new lease (*q*). By sect. 116 these statutory powers are applied not only to lunatics so found by inquisition but also to certain other classes of persons who are mentally incapable (*r*), and in the case of lunatics not so found they are exercisable by such person, in such manner, and with or without security, as the Judge directs.

Terms of
lease,
sect. 122 (2).

Leases authorized to be granted and accepted by or on behalf of a lunatic under the Act may be for such number of lives or such terms of years, at such rent and royalties, and subject to such reservations, covenants, and conditions as the Judge approves, and a lease may be authorized in pursuance of a previous contract with the committee, although not made subject to the sanction of the Judge (*s*).

Jurisdiction.

Subject to the rules in lunacy the jurisdiction of the Judge in lunacy as regards administration and management—including, therefore, both the authorizing and the approval of the terms of leases—may be exercised by the Masters (*t*). The Rules in Lunacy, 1893 (*u*), provide that when an order is made authorizing a lease of a lunatic's property, the Masters shall settle a proper lease in pursuance of the order, and their allowance of the lease when settled shall be sufficiently authenticated by the seal of the Masters'.

(*o*) Including under-leases, sect. 341; but not apparently a lease of an easement: *Re Arnott*, 1891, 35 Sol. Journ. 623.

(*p*) As to fines on such renewal, see sect. 122 (3).

(*q*) See sect. 121; and as to fines, premiums, &c., received on a grant or renewal of a lease, see sect. 123 (2). As to executing powers of leasing vested in a lunatic (including a statutory power: *Re Salt*, 1896, 1 Ch. 117), see sect. 120 (*h*), (*l*); and where the power is vested in the lunatic as trustee or guardian, sect. 128; *Re X.*, 1894, 2 Ch. 415.

(*r*) As to mental incapacity arising from disease or age, see *Re X.*, 1894, 2 Ch. 415; as to proof of unsoundness of mind: *Re Lees*, 1884, 26 C. D. 496; as to ascertaining the value of the lunatic's property: *Re Faircloth*, 1879, 13 C. D. 307.

(*s*) *Re Wynne*, 1872, 7 Ch. 229.

(*t*) Lunacy Act, 1891 (54 & 55 Vict. c. 27), s. 27 (1).

(*u*) Rule 10.

office; and the committee of the estate shall in the name and on behalf of the lunatic execute the lease when allowed, upon the intending lessee executing a counterpart thereof (*x*).

Where a tenant for life, or a person having the powers of a tenant for life under the S. L. A. 1882 (*y*), is a lunatic so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Judge in lunacy (*z*), exercise the powers of a tenant for life under the Act (*a*); and an order may be made on the petition of any person interested in the settled land or of the committee. The jurisdiction given by this section is expressly confined to cases where the person has been found a lunatic by inquisition and a committee appointed; but the powers of leasing conferred by the S. L. A. 1882, can be exercised on behalf of the lunatic by the committee acting with the authority of the Judge under sect. 120 (*h*) of the Lunacy Act, and hence they can be exercised also in the case of the persons mentioned in sect. 116 (*aa*) by the person appointed by the Judge (*b*). Where an infant is of unsound mind, but is not a lunatic so found, the powers of the S. L. A. 1882, can be exercised on his behalf under sects. 59 and 60 (*c*).

Settled Land
Act, 1882,
s. 62.

When a committee proposes to effect a grant of a lease under sect. 62, he must see that there are trustees for the purposes of the Act, or, if necessary, procure their appointment (*d*), and he must obtain the sanction of the Judge in lunacy before serving them with notice under sect. 45 (*e*).

Provision is also made by the Settled Estates Act, 1877 (*f*), for the exercise on behalf of lunatics of the powers conferred by that Act (*g*). All powers given by the Act, and all applications to the Court under the Act, and consents to and notifications respecting such applications, may

Settled
Estates
Act, 1877
s. 49.

(*x*) See Lunacy Act, 1890, s. 124. *Cf. Lawrie v. Lees*, 1881, 7 App. Cas. 19.

(*y*) 45 & 46 Vict. c. 38.

(*z*) *Cf.* sect. 108 of the Lunacy Act, 1890.

(*a*) *Infra*, p. 43. (*aa*) *Supra*, p. 12.

(*b*) *Re Baggs* (1894, 2 Ch. 416, *n.*), which seemed to decide the contrary, has been distinguished in *Re Salt* (1896, 1 Ch. 117).

(*c*) *Cf. Re Edwards*, 1879, 10 C. D. 605.

(*d*) *Cf. Re Taylor*, 1883, 31 W. R. 596.

(*e*) *Re Ray's S. E.*, 1884, 25 C. D. 464.

(*f*) 40 & 41 Vict. c. 18.

(*g*) *Infra*, pp. 50, 51.

be executed, made, or given by, and all notices under the Act may be given to, committees on behalf of lunatics. But in the case of a lunatic tenant in tail no application to the Court, or consent to or notification respecting any application, may be made or given by the committee without the special direction of the Court. Since sect. 46 gives a tenant for life power of leasing without any application to the Court, it seems that the committee of a tenant for life may grant a lease subject to the restrictions of the section without the order of the Judge in lunacy required by sect. 62 of the S. L. A. 1882.

Leases by or
to lunatic
personally.

A lease granted by or to a lunatic *personally* can be avoided if it appears that the other contracting party knew of his state of mind, and took advantage of it (*h*). But if this is not proved, and especially if the contract, having been entered into by the other party fairly and in good faith, has also been executed and completed, and the property forming the subject-matter of the contract has been paid for and fully enjoyed, such contract cannot afterwards be set aside either by the lunatic or those who represent him (*i*).

A lease made by a lunatic during a lucid interval is valid, but it is incumbent on the person claiming under such a lease to show clearly that it was executed at such a time (*k*).

III. MARRIED WOMEN.

Summary.

The law as to leases of the property of a married woman may be summed up as follows: (1) under an express power to lease she can lease as a *feme sole*; (2) she can create leases as a *feme sole* in property which is in equity her separate property; (3) she can create leases as a *feme sole* in property which is her separate property under the Married Women's Property Act, 1882, and in some cases, at any rate, in property which is her separate property under the Married Women's Property Act, 1870; (4) with

(*h*) *Dane v. Kirkwall*, 1838, 8 C. & P. 679; *Imperial Loan Co. v. Stone*, 1892, 1 Q. B. 599. See *Browne v. Joddrell*, 1827, M. & M. 105.

(*i*) *Molton v. Cumrour*, 1848, 2 Ex. 487, 503, 4 Ex. 17; *Beavan v. McDonnell*, 1854, 9 Ex. 309, 10 Ex. 184. See *Campbell v. Hooper*, 1855, 3 Sm. & G. 153; *Baxter v. Portsmouth*, 1826, 5 B. & C. 170; *Elliott v. Ince*, 1857, 7 D. M. & G. at p. 487.

(*k*) *Cragh v. Blood*, 1845, 2 Jo. & Lat. at p. 520.

respect to her non-separate property she may, with the concurrence of her husband, create leases under the Fines and Recoveries Act, 1833; (5) her husband, where she is seised in fee, and he is entitled to possession in her right, may lease under the Settled Estates Act, 1877; (6) renewals of leases may be granted under the Infants' Property Act, 1830; (7) where the married woman is a limited owner, leases may be granted under the S. L. A. 1882, by the married woman alone if her interest is her separate property; otherwise by her and her husband jointly; (8) where the husband is entitled to a life estate in right of his wife, he may make leases under the Settled Estates Act, 1877; (9) leases of property in which the married woman has a limited interest may be authorized by the Court under the same Act; (10) a married woman who is tenant in tail may, with the concurrence of her husband, grant a lease under the Fines and Recoveries Act, 1833. But while all these cases may occur, a married woman will, in practice, either lease as a *feme sole* where she is the absolute owner of equitable or statutory separate property; or with the concurrence of her husband under the Fines and Recoveries Act, 1833; or as a limited owner under the S. L. A. 1882, either without or with her husband, according as her interest in the settled estate is, or is not, her separate property.

Where by a settlement or will a woman is expressly empowered to demise, she may do so during coverture (*l*), and the concurrence of her husband is not necessary (*m*). Leases under powers.

Unless the power is expressly or by necessary inference restricted to leasing while *sole* (*n*), the married woman may exercise it although it was given to her when she was unmarried (*o*) or during a previous marriage (*p*). A power which provides that the donee may exercise it "notwithstanding coverture" may be exercised while the donee is *sole* (*q*). A lease made by a married woman under such a power need not be acknowledged by her under the Fines

(*l*) *Lady Travel's Case*, cited in *Hearle v. Greenbank*, 1749, 3 Atk. 711; *Doe v. Eyre*, 1846, 3 C. B. 557, 5 C. B. 713.

(*m*) Sugden on Powers, 8th ed. 155.

(*n*) *Marquis of Antrim v. D. of Buckingham*, 1663, 1 Ch. Cas. 17.

(*o*) *Gibbons v. Moulton*, 1678, Finch, 346.

(*p*) See *Burnet v. Mann*, 1748, 1 Ves. Sen. 156.

(*q*) *Doe v. Bird*, 1883, 5 B. & Ad 695.

and Recoveries Act, 1833 (*r*). It has been held that under a power of leasing a married woman cannot lease to her husband (*s*).

Equitable
separate
property.

A married woman who has property settled to her separate use, without restraint on alienation, may dispose of it as a *feme sole* (*t*). As regards such property she is freed from the disabilities of coverture, and invested with the rights and powers of a person who is *sui juris* (*u*). A lease granted by her operates as a direction to the trustees to convey or hold the estate according to the new trust created by such direction (*x*). Leases of such property need not be acknowledged under the Fines and Recoveries Act, 1833 (*y*).

Statutory
separate
property :
Married
Women's
Property Act,
1882, s. 2.

In many cases the property of a married woman is now made her separate property by statute, and she is able to dispose of it as a *feme sole*. By the Married Women's Property Act, 1882 (*z*), a woman married after the commencement of the Act—*i.e.* 1st of January, 1883—is entitled to hold as her separate property, and to dispose of as a *feme sole* (*a*) all real and personal property which belongs to her at the time of marriage, or is acquired by, or devolves upon, her after marriage; and a woman married before the commencement of the Act is entitled to hold and dispose of, in manner aforesaid, as her separate property, all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act; and the application of the Act depends on when the title accrues, not upon when it falls into possession (*b*). It follows that in all cases where the married woman's

Sect. 5.

(*r*) 3 & 4 Will. 4, c. 74 ; Farwell on Powers, 2nd ed. 117.

(*s*) *Doe v. Gilbert*, 1843, 5 Q. B. 423.

(*t*) *Francis v. Wigzell*, 1816, 1 Madd. p. 261 ; *Aylett v. Ashton*, 1835, 1 My. & Cr. 105.

(*u*) Per Lord Westbury in *Taylor v. Meads*, 1865, 4 D. J. & S. 597, 604 ; Lord Hatherley in *Pride v. Bubb*, 1871, 7 Ch. p. 69.

(*x*) Per Lord Westbury in *Taylor v. Meads*. See *Allen v. Walker*, 1870, L. R. 5 Ex. 187.

(*y*) *Taylor v. Meads*, 4 D. J. & S. 597 ; *Adams v. Gamble*, 1861, 12 Ir. Ch. R. 102.

(*z*) 45 & 46 Vict. c. 75.

(*a*) See sect. 1 ; *Hope v. Hope*, 1892, 2 Ch. p. 342 ; *Re Cuno*, 1889, 43 C. D. p. 16.

(*b*) *Reid v. Reid*, 1886, 31 C. D. 402.

property is separate property under these provisions (*c*) she has as full a power of leasing as though the disability of coverture did not exist, and no consent of her husband or acknowledgment of the deed is necessary (*d*). Similarly a married woman can now accept a lease, which will vest in her as her separate property, and she will be liable on the contract contained in the lease to the extent of her separate estate (*e*).

The statutory rule with regard to the disposition of the non-separate property of a married woman is contained in sect. 77 of the Fines and Recoveries Act, 1833 (*f*). A married woman, in every case except that of being tenant in tail, for which provision is otherwise made by the Act (*g*), may by deed dispose of lands of any tenure as fully and effectually as she could do if she were a *feme sole*, except that no such disposition is valid and effectual unless the husband concurs in the deed by which the same is effected, nor unless the deed is acknowledged by her, upon her executing the same, as her act and deed, before a Judge of the High Court (*h*), a Judge of a County Court (*i*), or a perpetual or special commissioner (*k*). Under this section a married woman can, with the concurrence of her husband, grant a lease of any unsettled property, and, with the exception of an estate tail, of any settled property to the extent of her interest.

Non-separate property.
Fines and Recoveries Act, 1833, s. 77.

Where a husband is entitled to the possession or to the receipt of the rents and profits of any unsettled estates (*l*) in right of a wife who is seised in fee, he may, under sect. 46 of the Settled Estates Act, 1877 (*m*), without any application to the Court, demise the same or any part thereof, except the principal mansion house and the

Leases by husband.
Settled Estates Act, 1877, s. 46.

(*c*) A more limited provision in favour of married women was made by the M. W. P. A. 1870, to which it may be still necessary to refer in the case of women married after 9th Aug. 1870, and before 1st Jan. 1883.

(*d*) Cf. *Re Drummond and Davie's Contract*, 1891, 1 Ch. 524.

(*e*) See M. W. P. A. 1893 (56 & 57 Vict. c. 63), s. 1.

(*f*) 3 & 4 Will. 4, c. 74.

(*g*) *Infra*, p. 19.

(*h*) Judicature Act, 1873, s. 16.

(*i*) County Courts Act, 1888, s. 184.

(*k*) Conveyancing Act, 1882, s. 7.

(*l*) The earlier part of the section enables a husband seised of settled estates in right of his wife to grant leases, *infra*, p. 18.

(*m*) 40 & 41 Vict. c. 18.

demesnes thereof, and lands usually occupied therewith, subject to the restrictions imposed by the section (*u*). The lease will be valid against the husband, and against his wife and all persons claiming through or under the wife (*o*).

Renewal of
lease.
Infants'
Property Act,
1830 (*p*), s. 16.

Sect. 12.

Where a *feme covert* might, in pursuance of any contract or agreement, if not under disability, be compelled to renew any lease, she may, by direction of the Court, upon application by herself or any person entitled to such renewal, accept a surrender of the lease and execute a new lease; and where a *feme covert* is entitled to any lease for life or years a surrender of the lease and an acceptance of a new lease may be ordered by the Court as in the case of an infant (*q*).

Limited
interest,
whether
separate or
non-separate.
Settled Land
Act, 1882,
s. 61, sub-s.(2).

If a married woman is entitled to a limited interest in possession in land, a lease may be granted under the S. L. A. 1882 (*r*). Where, if she had not been a married woman, she would have been a tenant for life, or would have had the powers of a tenant for life under the Act, and she is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, has the powers of a tenant for life under the Act. Hence where the interest of a married woman under a settlement is her separate property, whether in equity or by statute, and is of a nature to confer, apart from coverture, the powers of a tenant for life, the married woman can exercise by herself the powers of leasing conferred on a tenant for life under the Act (*s*). Where the married woman has such an interest, but it is not her separate property, then she and her husband together have the powers of a tenant for life. A restraint on anticipation will not prevent the exercise by her of the statutory power of leasing (*t*).

Sub-sect. (3).

Settled
Estates Act,
1877, s. 46.

Where a husband is entitled, in right of his wife, to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of

(*u*) *Infra*, p. 50.

(*o*) Sect. 47.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 65.

(*q*) *Supra*, p. 9.

(*r*) 45 & 46 Vict. c. 38.

(*s*) *Infra*, p. 44; and see sub-sect. (4).

(*t*) Sub-sect. (6).

years determinable with any life or lives, or for any greater estate, under a settlement made since November 1st, 1856 (sect. 57), he may, unless the settlement contains an express declaration to the contrary, make leases under sect. 46 of the Settled Estates Act, 1877 (*u*), subject to the restrictions imposed by the section (*x*).

Leases of settled estates in which married women have limited interests may also be authorized by the Chancery Division of the High Court under sect. 4 of the Settled Estates Act, 1877. Where a married woman applies to the Court, or consents to an application to the Court, she must first be separately examined (*y*) by the Court, or by some solicitor appointed by the Court, apart from her husband, touching her knowledge of the nature and effect of the application, and it must be ascertained that she freely desires to make or consent to such application; but separate examination is not now necessary where the interest is the separate property of the married woman under the Married Women's Property Act, 1882 (*z*). Subject to examination, where necessary, married women may make or consent to any application, whether they be of full age or infants (*a*). The exercise of the powers of the Court under the Act is not prevented by the existence of a restraint on anticipation. The Court has dispensed with examination where the proposed lease was clearly for the benefit of all parties, and to insist on examination would cause great delay (*b*); also where the interest of the married woman was remote (*c*), or where she had married after the filing of the petition (*d*).

Settled
Estates Act,
1877, s. 4.

Sects. 50, 51.

Sect. 52.

Sect. 50.

A married woman who is tenant in tail of lands may grant a lease under the Fines and Recoveries Act, 1833 (*e*),

Tenants in
tail.

(*u*) 40 & 41 Vict. c. 18.

(*x*) *Infra*, p. 50.

(*y*) As to mode and time of examination, see sect. 51 and S. E. Act, Orders 13 and 14.

(*z*) *Riddell v. Errington*, 1884, 26 C. D. 220; *Re Robinson's S. E.*, 1894, 38 Sol. Journ. 325. Cf. *Re Smith's Estate*, 1887, 35 C. D. p. 596.

(*a*) A married woman under age must be separately examined. It is not enough for her to consent as an infant by her guardian specially appointed for the purpose: *Re Broadwood's S. E.*, 1872, 7 Ch. 323.

(*b*) *Re Halliday's S. E.*, 1871, 12 Eq. 199; *Re Thorne's S. E.*, 1872, 20 W. R. 587.

(*c*) *Re Lord De Tabley's S. E.*, 1863, 11 W. R. 936. See *Re E. of Kilmorey's S. E.*, 1877, 26 W. R. 514.

(*d*) *Re Marshall's S. E.*, 1872, 15 Eq. 66.

(*e*) 3 & 4 Will. 4, c. 74; *infra*, p. 43.

Leases of
wife's free-
holds not in
pursuance of
statutes.

but the concurrence of her husband is necessary to give effect to the lease, and the deed must be acknowledged (*f*).

Leases of the freehold property of the wife, not her separate property, made by her alone (otherwise than under the provisions of the above statutes or of an express power), are void (*g*). If made either by husband and wife or by the husband alone (*h*), they are valid, to the extent of the term, during the joint lives of husband and wife (*i*). If not by deed, such leases (*g*) on the death of the husband become void as against the wife surviving and persons claiming under her (*j*). If made by deed, they are voidable by the widow on the death of the husband (*k*), and a lease which she avoids will be void as to her *ab initio* (*l*); but if, after her husband's decease, she accepts rent due after that event, or otherwise recognizes the lease as subsisting, it will become good and unavoidable (*m*). And even if the widow, without doing any act either to affirm or to disaffirm the lease, allows the tenant to continue in possession during her lifetime, it seems that the lease will be good and subsisting up to her death; and the rent which accrued due during her lifetime is recoverable by her executors (*n*). If the husband survives, and (having had issue by his wife born alive, that might by possibility inherit the estate as her heir) becomes tenant by the curtesy, a lease by the husband, or by the husband and wife, will be good for the whole term, provided the husband lives so long, but upon his death will become void (*o*).

(*f*) Sect. 40.

(*g*) See judgment in *Goodright v. Straphan*, 1774, Cowp. at p. 203.

(*h*) See 2 Wms. Saund. 180 a, note. In case the lease is made by the husband alone, the reversion is in him, and he alone can distrain for rent: *Harcourt v. Wyman*, 1849, 3 Ex. 817.

(*i*) *Bateman v. Allen*, 1594, Cro. Eliz. 437; *Wiscot's Case*, 1599, 2 Rep. at p. 61 b; *Jordan v. Wikes*, 1614, Cro. Jac. 332; *Toler v. Slater*, 1867, L. R. 3 Q. B. 42.

(*j*) As to leases by husband and wife, see *Walsal v. Heath*, 1579, Cro. Eliz. 656; *Turney v. Sturges*, 1553, Dyer, p. 91 b; *Parry v. Hindle*, 1809, 2 Taunt. p. 181. As to leases by the husband alone, see *Harvy v. Thomas*, 1589, Cro. Eliz. 216.

(*k*) *Smallman v. Agborow*, 1616, Cro. Jac. 417.

(*l*) See *Butler and Barker's Case*, 1591, 3 Rep. 28.

(*m*) *Jordan v. Wikes*, 1614, Cro. Jac. 332; *Greenwood v. Tyber*, 1619, ib. 563; *Doe v. Weller*, 1798, 7 T. R. 478. See *Toler v. Slater*, 1867 L. R. 3 Q. B. 42; Bac. Abr. (C.) 645.

(*n*) See *Toler v. Slater*, loc. cit. p. 46.

(*o*) *Miller v. Maynwaring*, 1635, Cro. Car. 397.

A lease expressed to be by husband and wife of freeholds belonging to the wife, executed under a power of attorney given by husband and wife, was before January 1st, 1882, the lease of the husband only (*p*), since the power of attorney was void as regards the wife. But a married woman has now power to appoint an attorney for the purpose of executing any deed (*q*), though the power is only exercisable where the deed does not require to be acknowledged (*qq*).

Underleases of the leasehold property of the wife, not being her separate property, may be made during the marriage by the husband in his own name, to commence either during his life or after his decease, and such an underlease will be valid though the wife should survive (*r*), and the rent, if reserved to the husband, formerly went to the representatives of the husband after his death (*s*). And it has been held that a covenant by the husband to grant an underlease binds the estate after his death (*t*). If the husband underleases part of the property comprised in a lease held by his wife, the wife surviving will be entitled to the rest of the property (*u*). Formerly the husband could dispose of a term vested in his wife as personal representative (*v*), but the law in this respect seems to have been altered by the Married Women's Property Act, 1882 (*x*).

A lease granted to a married woman might formerly be disaffirmed by her husband, but it vested in her until he expressed his dissent (*y*). After his death, however, the wife or her representatives might avoid the lease, unless after the date of his death she had assented to it (*z*). But, having regard to the powers enjoyed by married women under the Married Women's Property Acts, a married

Underleases.

Leases to married women.

(*p*) *Gardiner v. Norman*, 1622, Cro. Jac. 617.

(*q*) Conveyancing Act, 1881, s. 40.

(*qq*) Wolstenholme, B. & C., Conv. Acts, 7th ed. p. 93.

(*r*) *Anon.*, 1592, Poph. 4. See *Harbin v. Chard*, 1595, *ib.* p. 97; *Harbin v. Barton*, 1595, Moore, 395; *Grute v. Locroft*, 1591, Cro. Eliz. 287; Bac. Abr. (C.) 648.

(*s*) *Blaxton v. Heath*, 1619, Poph. 145. See now Conv. Act, 1881, s. 10.

(*t*) *Steed v. Cragh*, 1714, 9 Mod. 43; but this is doubtful. See *Druce v. Denison*, 1801, 6 Ves. 385. (*u*) *Sym's Case*, 1584, Cro. Eliz. 33.

(*v*) *Thrustout v. Coppin*, 1772, 2 W. Bl. 801.

(*x*) Sects. 1, 24; Wms. on Executors, 9th ed. p. 834.

(*y*) See judgment in *Swaine v. Holman*, 1617, Hob. 204; Co. Litt. 3 a.

(*z*) Co. Litt. 3 a.

woman can now effectually take a lease without her husband's concurrence, and she will be liable to the extent of her separate property under the covenants in the lease.

IV. ALIENS.

Former law. At common law alien enemies, since they were disabled from maintaining any action or getting anything within the realm (*a*), could neither make nor take leases of any kind of property. An alien friend could acquire and hold personal property, other than leaseholds, but the Crown, upon office found, could seize lands and houses acquired by him, save only a house acquired for his necessary habitation (*b*). But 33 Vict. c. 14. under the Naturalization Act, 1870 (*c*), real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject (*d*), and since no qualification is imposed on the term "aliens" such as that in the earlier enabling statute, 7 & 8 Vict. c. 66, s. 5 (*e*), it would seem that alien friends and enemies alike can now make and take leases like British subjects.

V. CONVICTS.

Convicts, 33 & 34 Vict. c. 23, ss. 6, 8. By virtue of the Forfeiture Act, 1870, a convict (*i.e.* any person against whom judgment of death or of penal servitude has been pronounced upon any charge of treason or felony) is incapable, while undergoing his sentence, of alienating any property, or of making any contract save as in the Act provided. He is consequently incapable of making any lease, and should a lease be made to him it would, like all his other property, real and personal, vest in the administrator appointed under the Act (*f*). But the administrator

(*a*) See *Calvin's Case*, 1609, 7 Rep. p. 17 a.

(*b*) Co. Litt. 2 b; 1 Bl. Comm. 360. See *Jervons v. Harridge*, 1667, 1 Saund. p. 7.

(*c*) 33 Vict. c. 14.

(*d*) Sect. 2. The section is not retrospective: *Sharp v. S^r. Sauvcur*, 1871, 7 Ch. 343.

(*e*) The phrase used there was "alien being the subject of a friendly state." The statute is repealed: 33 Vict. c. 14.

(*f*) The property reverts in the convict upon his ceasing to be subject to the operation of the Act, or in his heir or legal personal representatives, or other persons entitled thereto (sect. 18). An interim curator may be appointed by justices of the peace in case no administrator is appointed (sect. 21) with power to "manage and administer" the property of the convict, but with no express power to let (sect. 24).

has absolute power to let any part of the property of the convict as to him shall seem fit. The disabilities of the Act do not operate while the convict is lawfully at large under any licence.

Sect. 12.

Sect. 30.

VI. CORPORATIONS.

Independently of any restrictions imposed by legislation and the provisions of their own constitutions and bye-laws, corporations are at liberty to alienate their lands for any interest consistent with their own estate (*g*). But since, as a general rule, corporations can only contract under seal (*h*), leases by or to them must be made by deed, sealed with their common seal (*i*). Although, however, leases by corporations not so made are void, yet if the tenant has actually occupied and paid rent under the void instrument, and the corporation has received such rent, an implied tenancy from year to year may exist upon such of the terms of the void instrument as are applicable to that kind of tenancy, and an action may be maintained by the corporation for a breach of such terms (*k*). And wherever it would occasion very great inconvenience or tend to defeat the very object for which the corporation was created, the rule requiring the contract of the corporation to be under seal will not prevail; hence the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions (*l*). Thus a licence to use a graving dock belonging to a corporation for the purpose of repairing a ship need not be under the seal of the corporation (*m*).

Leases by a corporation.

If a contract not under seal for a lease by a corporation

(*g*) *Mayor of Colchester v. Louten*, 1813, 1 V. & B. 226, 244; *Smith v. Barrett*, 1664, 1 Sid. p. 162.

(*h*) See per Rolfe, B. in *Mayor of Ludlow v. Charlton*, 1840, 6 M. & W. at p. 823; *Cooch v. Goodman*, 1842, 2 Q. B. 580.

(*i*) *Finlay v. Bristol and Exeter Ry. Co.*, 1852, 7 Ex. 409. Per Lord Ellenborough in *Rex v. Chipping Norton*, 1804, 5 East, 239 (the demise in the case was, however, of an *incorporeal* hereditament, and in *Rex v. North Duffield*, 1814, 3 M. & S. 247, the decision was expressly put on this ground). See *Predynman v. Wodry*, 1606, Cro. Jac. at p. 110. As to the liability of a corporation for use and occupation, see *Lowe v. L. & N. W. Ry. Co.*, 1852, 18 Q. B. 632.

(*k*) *Wood v. Tate*, 1806, 2 B. & P. (N. R.) 247; *Ecclesiastical Commissioners v. Merral*, 1869, L. R. 4 Ex. 162.

(*l*) *Church v. Imperial Gas Light Co.*, 1838, 6 A. & E. at p. 861; approved in *Mayor of Ludlow v. Charlton*, 1840, 6 M. & W. at p. 822.

(*m*) *Wells v. Mayor, &c., of Hull*, 1875, L. R. 10 C. P. 402.

has been partly performed, specific performance of such contract will be decreed (*n*). In the absence of part performance, a contract made by an agent on behalf of a corporation, and requiring to be under seal, cannot be enforced unless either the agent was appointed under seal, or the contract has been ratified under seal before the offer of the other party has been withdrawn (*o*).

A power given by private Act of Parliament to a corporation to sell its property has been held to authorize the grant of a building lease with an option of purchase (*p*).

Leases to a
corporation.

Corporations (*q*) may take leases of land of moderate and usual length, such as a husbandry lease for twenty-one years (*r*). But a lease for a term of unusual duration—*e.g.* for eighty-one years (*s*) or 100 years (*t*)—no licence in mortmain having been obtained—may incur the penalty of forfeiture on the ground that the land is brought into mortmain under colour of a lease (*u*). Such a lease,

(*n*) *Marshall v. Corp. of Queenborough*, 1823, 1 S. & S. 520; *Steevens' Hospital v. Dyas*, 1864, 15 Ir. Ch. 405, 420; *Crook v. Corp. of Seaford*, 1871, 6 Ch. 551; Fry on Spec. Perf., 3rd. ed. p. 300; but see *Hunt v. Wimbledon Local Board*, 1878, 4 C. P. D. 48. As to estoppel resulting from part performance, see *Fishmongers' Co. v. Robertson*, 1843, 5 M. & Gr. 131; *Mayor of Kidderminster v. Hardwick*, 1873, L. R. 9 Ex. 13.

(*o*) *Mayor of Oxford v. Crow*, 1893, 3 Ch. 535; *Athy Guardians v. Murphy*, 1896, 1 Ir. R. 65. Though from *Bolton Partners v. Lambert* (1889, 41 C. D. 295) it would seem that ratification under seal is effectual notwithstanding the offer has been previously withdrawn. See *Re Portuguese Mines, Limited*, 1890, 45 C. D. 16.

(*p*) *Re Female Orphan Asylum*, 1867, 15 W. R. 1056.

(*q*) As to the necessity of correctly describing the corporation in the lease, see *R. v. Haughley*, 1833, 4 B. & Ad. p. 655; *Mayor of Lynne's Case*, 1613, 10 Rep. 120 a.; *Croydon Hospital v. Farley*, 1816, 6 Taunt. 467. Any requirements specified in a statute under which the lease is made must be strictly complied with: *Kent Coast Ry. Co. v. L. C. & D. Ry. Co.*, 1868, 3 Ch. 656.

(*r*) See *Jesus Coll. v. Gibbs*, 1835, 1 Y. & C. Ex. 145, 147.

(*s*) Per Bridgman, C.J., in *Hemming v. Brabazon*, 1660, O. Bridg. Rep. (by Bannister), p. 7. See 1 Platt on Leases, 541. Though it seems to have been thought that a lease to a corporation for ninety-nine years is valid, "for it is very usual:" Vin. Abr. "Mortmain," p. 485.

(*t*) *Rowles v. Mason*, 1612, Brown. & G., Part II. p. 197. Per Tanfield C.B., in *Cotton's Case*, 1613, Godb. p. 192.

(*u*) Stat. 7 Edw. 1, stat. 2, c. 1; now the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). For exemptions from Part I. of the Act see Tudor on Charitable Trusts, 1889, p. 429. But in *Vigers v. Dean and Chapter of St. Paul's*, 1849, 14 Q. B. p. 919, the Court said they had "not been able to find any authority for the proposition that the Statutes of Mortmain forbid a corporation to hold that which is not in itself perpetual."

however, is not void, but only voidable on entry of the lord or the Crown for the forfeiture.

(a) *Ecclesiastical Corporations.*

Ecclesiastical corporations are either aggregate, consisting of several persons, as the dean and chapter of a cathedral, or sole, consisting of one person, as a bishop or incumbent.

Leases granted by a spiritual corporation sole without confirmation were at common law valid during the life or tenure of office of the lessor (*x*). Upon his death or other avoidance they became either voidable or absolutely void, according as the lessor had the whole or only a qualified fee simple (*y*). In the latter case, as where the lease had been made by a vicar, the acceptance of rent by the successor would not set up the lease, but might create a tenancy from year to year (*z*). But a bishop has the whole fee, and a lease by him is voidable only. Where a lease by a bishop, which has been granted in consideration of the surrender of a prior lease by deed-poll, has been avoided by the successor, the first lease is not revived by such avoidance (*a*).

Leases by spiritual corporation sole at common law.

But with the confirmation required by law, *i.e.* in the case of a bishop, with the confirmation of his dean and chapter, and in the case of a parson or vicar, with the confirmation of his patron and bishop, these corporations might grant, for lives or years without any limitation, leases which would bind their successors (*b*).

A patron might confirm explicitly by deed or writing, or by consequence of law; as, for instance, where a parson made a lease for years to the patron, who granted or assigned it over to another (*c*). It was not material whether the confirmation was before or after the making of the lease, provided it took place in the lifetime of the parties to the lease (*d*).

Confirmation.

Spiritual and eleemosynary corporations aggregate might make leases for lives or years without limitation binding

Leases by spiritual and eleemosynary corporations aggregate.

(*x*) Co. Litt. 44 a; 2 Blackst. Comm. 318; *Price v. Williams*, 1836, 1 M. & W. p. 13; Platt on Leases, I. 318.

(*y*) Bac. Abr. (H.) 764.

(*z*) *Doe v. Collinge*, 1849, 7 C. B. 939; *infra*, p. 95.

(*a*) *Doe v. Bridges*, 1831, 1 B. & Ad. 847.

(*b*) Co. Litt. 44 a; *B. of Salisbury's Case*, 1604, 10 Rep. 58 b; Bac. Abr. (G. 2) 742.

(*c*) *Hodges v. Newcomen*, 1588, cited 5 Rep. 15; Bac. Abr. (G. 2) 753.

(*d*) Bac. Abr. (G. 4) 758.

on their successors (*e*) without the necessity of confirmation. A lease by the head of the corporation requires the consent of a majority only of the other members (*f*).

These common law powers were partly extended and partly restricted by statutes of Henry VIII. and Elizabeth, but at the present day leases are usually granted under powers conferred by a series of statutes of the present reign.

The enabling statute.

32 Hen. 8, c. 28, ss. 1, 2, 4.

Corporations sole (except parsons and vicars) may lease lands, &c., for twenty-one years, or three lives.

Under the enabling statute, 32 Hen. 8, c. 28 (*g*), an ecclesiastical corporation sole (*h*) having any estate of inheritance in right of his church, excepting a parson or vicar (*i*), may make leases which will be effectual against the lessor and his successors, of lands, tenements, or hereditaments commonly let for twenty years next before such leases (*k*), for terms not exceeding twenty-one years or three lives (*l*) from the day of making thereof; but such leases (*m*) must be made by indenture; must reserve yearly during the whole term the most accustomed rent or more; and must not be made without impeachment of waste, or while any old lease of the same premises is subsisting, unless such lease be expired, surrendered, or ended within one year next after the making of the new lease. Land formerly let under one lease may be demised under several leases, provided the total of the several rents is not less than the amount of the ancient single rent (*n*).

(*e*) Bac. Abr. (G. 1) 741; Co. Litt. 44 a.

(*f*) See 33 Hen. 8, c. 27, which provides that every statute made by any founder of any hospital, college, or other corporation whereby the lease of the governor with the assent of the majority of such of the same corporation as shall have voice of assent to the same at the time of such lease should be hindered by the lesser number of such corporation, contrary to the common law, should be void.

(*g*) Repealed by the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), s. 35, except so far as relates to leases made by persons having an estate in right of their churches.

(*h*) *E.g.* a prebendary (*Watkinson v. Man*, 1585, Cro. Eliz. 349); or the chancellor of a cathedral (*Bisco v. Holte*, 1664, 1 Lev. 112); or a bishop. See Bac. Abr. (E.) 686.

(*i*) As to a perpetual curate, see *Doe v. Thomas*, 1839, 9 A. & E. 556.

(*k*) *Doe v. Yarrowborough*, 1822, 1 Bing. 24; Bac. Abr. (E.) 712.

(*l*) The term of three lives cannot be extended by the insertion of a covenant to put in new lives as the old ones drop: *Moore v. Clench*, 1875, 1 C. D. 447.

(*m*) See Co. Litt. 44 a. As to leases of tithes, tolls, or other incorporeal hereditaments, see 5 Geo. 3, c. 17, s. 1.

(*n*) 39 & 40 Geo. 3, c. 41.

The leases authorized by the foregoing statute can be made by a corporation sole without confirmation (*o*). On the other hand the restraining statutes of Elizabeth abridged the common law powers of leasing even with confirmation. Under 1 Eliz. c. 19, s. 4, leases made by any archbishop or bishop, and under 13 Eliz. c. 10, s. 3 (*p*), leases made by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital (*q*), parson, vicar, or any other having any spiritual or ecclesiastical living, of any hereditaments belonging to their spiritual promotion, exceeding twenty-one years (*r*), or three lives from the time at which they are made (*s*), or not reserving the accustomed yearly rent (*t*), or more, payable yearly during the term, are void. But notwithstanding this express statutory declaration, it has been held that, since the statute was made for the benefit of the successor, the lease is valid during the life of the corporation sole, or of the head of the corporation aggregate, by whom it was granted (*u*), and is only voidable by his successor, though it may be confirmed by his acceptance of rent from the lessee (*x*). This laxity of construction, however, has recently been disapproved of, and has not been allowed in the case of an eleemosynary corporation aggregate without a head (*y*); it being held that leases contrary to the statute are void *ab initio*. And it is doubtful whether the same strictness would not be extended to such leases granted by any eleemosynary or ecclesiastical corporation aggregate. It is to be observed, however, that if any rent is reserved on a void lease, and such rent

The restraining statutes.

1 Eliz. c. 19, s. 5; 13 Eliz. c. 10, s. 3.

Leases by spiritual corporations must not exceed twenty-one years and must observe certain conditions.

(*o*) *B. of Salisbury's Case*, 1614, 10 Rep. 58 b.

(*p*) As to the extent of the Act, see *Magdalen Coll. Case*, 1616, 11 Rep. 76 a.

(*q*) As to leases by hospitals, see 14 Eliz. c. 14 and 39 Eliz. c. 5.

(*r*) A lease for a less term or number of lives is good: *Carter and Uagcole's Case*, 1590, 1 Leon. 306.

(*s*) In 1 Eliz. c. 19, "from such time as any such lease shall begin."

(*t*) See *Doe v. Yarborough*, 1822, 1 Bing. 24. And as to ancient rents which have become divided, see 39 & 40 Geo. 3, c. 41.

(*u*) 2 Shep. Touch. 283; Co. Litt. 45 a; *Hunt v. Singleton*, 1598, referred to in *Lincoln Coll. Case*, 3 Rep. 60 a; *B. of Salisbury's Case*, 1614, 10 Rep. 58 b; *Roe v. Archb. of York*, 1805, 6 East, p. 103.

(*x*) *Pennington v. Cardale*, 1858, 3 H. & N. p. 666. See per Holroyd, J., in *Edwards v. Dick*, 1821, 4 B. & A. 217; per Bayley, J., in *Doe v. Banks*, 1821, *ib.* p. 407; *Doe v. Tanier*, 1848, 12 Q. B. 998.

(*y*) *Magdalen Hospital v. Knott*, 1879, 4 App. Cas. 324.

is accepted, a tenancy from year to year on such of the terms of the lease as are applicable to that tenancy will be created (z).

Except leases not exceeding forty years of houses in towns, &c.

14 Eliz. c. 11, ss. 17, 19 (a).

The foregoing restrictions do not extend to leases for terms not exceeding forty years of houses or of grounds thereto appertaining, situate in any city, borough, town corporate, or market town, or the suburbs of any of them ; provided the house is not the capital or dwelling house of the lessors, and the grounds thereto belonging do not exceed ten acres ; and provided the leases are made subject to the conditions specified in the statute.

The result of the above statutes is that a lease by a corporation sole, as a bishop, if not prohibited by the statutes of Elizabeth, must, to avoid the necessity of confirmation, be made in accordance with 32 Hen. 8, c. 28. Otherwise it is made under the common law power and requires confirmation.

Concurrent leases restrained.

A concurrent lease, the term of which extends beyond the term of the prior lease, is a lease in reversion, and cannot be made under 32 Hen. 8, c. 28, unless the old lease expires or is surrendered within a year of the making of the new lease. The statute 13 Eliz. c. 10, does not prohibit leases in reversion, which could therefore still be made at common law, but the omission was cured by 18 Eliz. c. 11, s. 1, which allowed a new lease only within three years of the expiry or surrender of the old one. Thus a lease by a bishop made more than one and less than three years before the termination of the old one was good if confirmed by the dean and chapter (b). The statute 14 Eliz. c. 11, provides that no lease shall be made under it in reversion (c), but it is to be read with 13 Eliz. c. 10 and 18 Eliz. c. 11, and a new lease of a town house for twenty-one years made within three years of the termination of an old one for forty years is good (d).

Statutes of Victoria.

Although the above statutes have not been repealed, the leases of ecclesiastical corporations have been put on a new footing by statutes passed in the present reign.

(z) See *infra*, p. 94.

(a) Numbered as sects. 5 and 7 in Statutes Revised.

(b) Co. Litt. 45 a. (c) *Hunt v. Singleton*, 1597, Cro. Eliz. 564.

(d) *Vivian v. Blombery*, 1836, 3 Bing. N. C. 311 ; *Grumbrell v. Roper*, 1820, 3 B. & A. 711.

By the Ecclesiastical Leases Act, 1842, the incumbent of any benefice (*e*), with the consent of the patron and bishop, and, where the lands are copyhold, and a lease cannot be effectually made without his licence, with the consent of the lord of the manor, such consents being testified in the manner mentioned in the Act, may lease by deed any part of the glebe lands, or other lands belonging to such benefice (*f*) (except the parsonage house, &c., and at least ten acres of glebe, where there is so much glebe within five miles from the parsonage house), for any term not exceeding fourteen years, or twenty years if the lessee is to execute improvements; subject to the observance of certain conditions (*g*).

Leases by incumbents.
5 & 6 Vict.
c. 27, s. 1.
Incumbents, with consent of patron and bishop, may lease glebe for fourteen or twenty years.

After this statute an incumbent could still exercise his common law power of leasing, subject to confirmation by the patron and bishop, and a lease so granted was valid even though it did not observe the requirements of the Act, provided it complied with the restrictions of the statutes of Elizabeth (*h*). But by subsequent Acts the common law power has been abolished (*i*).

The statutes of Elizabeth incidentally prohibited mining leases, even where the necessary consents were obtained, for the opening of new mines is waste, and waste is an alienation not authorized by the statute (*k*). This was rectified, and at the same time power was given to grant building leases and other leases for long terms, by the Ecclesiastical Leasing Act, 1842.

Building and mining leases.

Any ecclesiastical corporation, aggregate or sole (*l*) (except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and any ecclesiastical hospital or the master thereof), with the consent of the Ecclesiastical Commissioners for England,

5 & 6 Vict.
c. 108,
ss. 1—9. 18,
20—32.

(*e*) See sect. 15.

(*f*) Including lands vested in trustees in trust for the incumbent in such a manner that the net income, or three-fourths at least of the net income, shall be payable for the exclusive benefit of such incumbent; but the trustees must be made parties to and execute the lease: sect. 13.

(*g*) See *Jenkins v. Green* (No. 2), 1859, 27 Beav. 440.

(*h*) *Jenkins v. Green* (No. 3), 1859, 28 Beav. 87; 1 De G. F. & J. 454.

(*i*) *Infra*, p. 30.

(*k*) *Ecclesiastical Commissioners v. Woodhouse*, 1895, 1 Ch. 552.

(*l*) In England or Wales, or the Channel Islands: sect. 32. See 37 & 38 Vict. c. 96.

With certain consents any ecclesiastical corporation may grant building leases for ninety-nine years : leases of running water, easements or mines for sixty years.

21 & 22 Vict.
c. 57, s. 1.

Or may lease in such manner as the Ecclesiastical Commissioners shall direct.

and also in the case of a lease made by any incumbent of a benefice, with the consent of the patron thereof, and in the case of copyholds where the lease could not be made without the licence of the lord, with the consent of the lord of the manor, such consents to be testified in each case as in the Act is mentioned (*m*), may, by deed, grant building, repairing or improving leases for any term not exceeding ninety-nine years, and leases of mines or quarries, running water, way-leaves and other like easements, for any term not exceeding sixty years ; subject to the observance of the conditions and restrictions mentioned in the Act.

More generally it is provided by the Ecclesiastical Leasing Act, 1858, that in any case in which it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners that all or any part of the property of any ecclesiastical corporation, by the last-mentioned Act authorized to be leased, might, to the permanent advantage of the estate or endowments belonging to such corporation, be leased in any manner, any ecclesiastical corporation, aggregate or sole (except the corporations excepted in the said Act (*mm*)), with such consents as in the said Act are mentioned, and with the approval of the Commissioners, to be testified by deed under their common seal, may lease all or any part of the lands, houses, mines, minerals or other property belonging to such corporation, either in consideration, or partly in consideration, of premiums or not, or for such other considerations, for such term or terms, and under and subject to such covenants, stipulations, conditions, and agreements on the part of the lessee, and generally in such manner as the Commissioners shall under the circumstances of each case think proper (*n*).

This Act and the previous Act do not apply to the Isle of Man (*o*).

Abolition of common law power of leasing.

The common law power of leasing, which, as already pointed out, had not been touched by the enabling statute, 5 & 6 Vict. c. 27, has been abolished as regards prebendaries and incumbents whose title accrues after 6th August, 1861. Under the Ecclesiastical Leases Act, 1861, it is not lawful

(*m*) Sects. 21—27.

(*mm*) *Supra*, p. 29.

(*n*) As to contracts for leases and surrenders, see sect. 4.

(*o*) 29 & 30 Vict. c. 81.

for a prebendary of any prebend (not being a prebend of any cathedral or collegiate church), rector, vicar, perpetual curate or incumbent, who, after the passing of the Act (6th August, 1861), may become possessed of, or entitled to any manors, lands, tenements or hereditaments belonging to any ecclesiastical benefice in England, to make any grant by copy of court-roll or lease of any such manors, lands, tenements, or hereditaments, in consideration of any fine, premium or foregift, but the same may, by any rector, vicar, perpetual curate, or incumbent after the passing of this Act, be leased under the provisions of the statutes 5 & 6 Vict. c. 27; 5 & 6 Vict. c. 108; or 21 & 22 Vict. c. 57. By the Ecclesiastical Leases Act, 1862 (25 & 26 Vict. c. 52), the prohibition was extended to all leases of such manors, lands, tenements and hereditaments made for any longer term, or in any other way than according to the provisions of the three statutes just mentioned.

24 & 25 Vict. c. 105; 25 & 26 Vict. c. 52.
No lease by any future prebendary, rector, &c., to be valid unless made in pursuance of certain Acts.

Various restrictions have been imposed by modern statutes on the letting of ecclesiastical property: as to the letting of residences attached to benefices, see 1 & 2 Vict. c. 106, s. 59; as to land acquired under the Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 104), see sect. 9 of that Act; as to land acquired under the Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), see sect. 9 of that Act; as to lands assigned as the endowment of a see under the Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), see sect. 8 of that Act; and as to leases by a dean and chapter, see 31 & 32 Vict. c. 114, s. 9.

Further restrictions.

The renewal of leases is regulated by the Ecclesiastical Leases Act, 1836, which, as explained by 6 & 7 Will. 4, c. 64, prohibits any ecclesiastical corporation, sole or aggregate, from granting any new lease, by way of renewal of any lease which has been previously granted for two or more lives, until one or more of the persons for whose lives such lease has been made shall die, and then only for the surviving lives or life, and for such new life or lives as, together with the life or lives of such survivor or survivors, shall make up the number of lives, not exceeding three in the whole, for which such lease has been originally made. Leases originally granted for forty years may be renewed after fourteen years have expired; leases for thirty years,

Renewal of leases.
6 & 7 Will. 4, c. 20, s. 1.

Sect. 4.

after ten years; and leases for twenty-one years, after seven years. But where it is certified that for ten years past such has been the usual practice (such practice in the case of a corporation sole having commenced prior to the time of the person for the time being representing such corporation), leases may be renewed at shorter periods. Leases granted for terms of years cannot be renewed for lives.

Sect. 1.

Leases to
ecclesiastical
persons.

1 & 2 Vict.
c. 106, s. 28.

Beneficed
clergy not to
occupy more
than eighty
acres of land
without per-
mission of
bishop.

The granting of occupation leases to beneficed clergymen is restrained by the Pluralities Act, 1838, under which it is not lawful for any spiritual person, holding any cathedral preferment or benefice, or any curacy or lectureship, or licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease or otherwise, for term of life, or years, or at will, any lands exceeding eighty acres in the whole, for the purpose of occupying, or using, or cultivating the same, without the permission in writing of the bishop of the diocese specially given for that purpose under his hand; and every such permission must specify the number of years, not exceeding seven, for which such permission is given; under a penalty of 40s. per annum for every acre of land above eighty acres so taken to farm contrary to the provision aforesaid.

A lease granted to a corporation aggregate goes to their successors (*p*); but a lease for years to a corporation sole, as to a bishop, will on his death devolve upon his executors *en autre droit* (*q*).

A corporation aggregate may lease to one of their own members, provided his concurrence is not necessary for the granting of the lease (*r*).

(b) Universities and Colleges.

Leases of the lands of the Universities of Oxford, Cambridge, and Durham, and of the colleges in those universities, and of the Colleges of Winchester and Eton, may be granted under the Universities and Colleges Estates Acts, 1858 to 1898 (*s*).

(*p*) Bac. Abr. Corporations (E.) 4.

(*q*) Co. Litt. 46 b; 1 Platt on Leases, 542.

(*r*) 1 Platt on Leases, 542; *Salter v. Grosvenor*, 1724, 8 Mod. 303.

(*s*) 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59; 43 & 44 Vict. c. 46;

(c) *The Crown.*

By 1 Ann. c. 1, s. 5 (t), a restriction was placed upon Crown leases. leases of Crown hereditaments (except advowsons) for terms exceeding thirty-one years or three lives, or, in the case of building or repairing leases, fifty years or three lives. By the Crown Lands Act, 1829 (u), the Crown lands were placed under the management of the Commissioners of Woods and Forests, who were empowered to lease for any term not exceeding thirty-one years, or, in the case of building leases, ninety-nine years, subject to the conditions mentioned in the Act. As to enrolment of such leases by a deposit of a duplicate thereof in the Office of Land Revenue, Records, and Enrolments (v), see the Crown Lands Act, 1829 (u), s. 63; the Crown Lands Act, 1852 (y), s. 7; and the Crown Lands Act, 1853 (z), s. 6. See also as to mining leases, the Crown Lands Act, 1873 (a), s. 4; as to surrenders, the Crown Lands Act, 1845 (b), s. 6; and the Crown Lands Act, 1894 (c); as to release from covenants, the Crown Lands Act, 1852 (y), s. 2.

As to leases taken on behalf of the Crown, see the Crown Lands Act, 1829 (u), ss. 47, 49.

As to leases of the private estates of the Crown, see the Crown Private Estates Acts, 1862 and 1873 (d).

As to leases of foreshores, which, where Crown property, are now in general placed under the management of the Board of Trade, see the Crown Lands Act, 1845 (e), s. 1; the Crown Lands Act, 1866 (f), ss. 7, 8; and, where the shore is used for oyster and mussel fisheries, the Crown Lands Act, 1885 (g), s. 3. Foreshore.

61 & 62 Vict. c. 55. See also as to Eton and Winchester Colleges, the Public Schools Act, 1868 (31 & 32 Vict. c. 118), s. 24.

(t) 1 Ann. stat. 1, c. 7, in Ruffhead. See 1 & 2 Vict. c. 95, s. 4.

(u) 10 Geo. 4, c. 50; see ss. 22—31.

(v) See Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 21; Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 6.

(y) 15 & 16 Vict. c. 62.

(z) 16 & 17 Vict. c. 56.

(a) 36 & 37 Vict. c. 36.

(b) 8 & 9 Vict. c. 99.

(c) 57 & 58 Vict. c. 43.

(d) 25 & 26 Vict. c. 37; 36 & 37 Vict. c. 61.

(e) 8 & 9 Vict. c. 99.

(f) 29 & 30 Vict. c. 62.

(g) 48 & 49 Vict. c. 79.

As to leases by the Commissioners of Works, see the Commissioners of Works Act, 1852 (*h*).

As to leases of land in the Forest of Dean, see 1 & 2 Vict. c. 43, s. 25 ; 24 & 25 Vict. c. 40, s. 6.

As to leases of lands belonging to the Duchy of Lancaster, see 48 Geo. 3, c. 73 ; 52 Geo. 3, c. 161 ; 1 & 2 Geo. 4, c. 52, ss. 12, 13 ; and as to leases of lands belonging to the Duchy of Cornwall, see Duchy of Cornwall Management Acts, 1863 and 1868 (*i*).

(*d*) *Municipal Corporations and other Local Authorities.*

Municipal
Corporations.
45 & 46 Vict.
c. 50.

May grant
building
leases for
seventy-five
years, and
other leases
for thirty-one
years.
Sect. 108.

Under the Municipal Corporations Act, 1882 (*k*), the council of a municipal corporation may make a lease or agreement for a lease of corporate property for a term not exceeding thirty-one years from the date of the lease or agreement, reserving during the whole of the term such yearly rent as to the council seems reasonable, without any fine ; and they may make a lease or agreement for a lease for a term not exceeding seventy-five years, either at a reserved rent or on a fine, or both, as the council think fit :—

- (i.) Of tenements or hereditaments, the greater part of the yearly value of which, at the date of the lease or agreement, consists of any building or buildings ; or
- (ii.) Of land proper for the erection of any houses or other buildings thereon, with or without gardens, yards, curtilages, or other appurtenances to be used therewith ; or
- (iii.) Where the lessee or intended lessee agrees to erect a building or buildings thereon of greater yearly value than the land,—of land proper for gardens, yards, curtilages, or other appurtenances to be used with any other house or other building erected or to be erected on any [such (*kk*)] land, belonging either to the corporation

(*h*) 15 & 16 Vict. c. 28.

(*i*) 26 & 27 Vict. c. 49 ; see sects. 21—28 ; 31 & 32 Vict. c. 35.

(*k*) The Act applies only to boroughs to which at the time of its passing the Municipal Corporations Act, 1835, applied, and to towns the inhabitants whereof are incorporated after the commencement of the Act, and whereto the provisions of the Municipal Corporations Acts are, under the Act, extended by charter : sect. 6. For the former powers, see 5 & 6 Will. 4, c. 76, ss. 94, 96 ; 6 & 7 Will. 4, c. 104, s. 2.

(*kk*) The word “such” seems to have been inserted by mistake. *Cf.* Crown Lands Act, 1829, s. 23.

or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building (*l*).

But otherwise the council cannot grant a lease without the approval of the Treasury (*m*). With such approval they may grant a lease of corporate lands on such terms and conditions as the Treasury approve. Sect. 109.

These corporations, however, may renew leases in cases in which, on the 5th June, 1835, they were bound by covenant or agreement, or enjoined by any deed, will or other document, or sanctioned or warranted by ancient usage to make renewal; and also in all cases in which they had theretofore ordinarily made renewal of any lease, they may renew such lease as they might have done in case the Act had not been passed: a provision, it has been held, which ought to receive a liberal interpretation (*n*). Sect. 110.

As to leases by and to District Councils (*o*), see the Public Health Act, 1875 (*p*), ss. 27, 29, 51, 175, 177. District councils, &c.

As to leases for artizans' dwellings, where an improvement scheme is being adopted, see the Housing of the Working Classes Act, 1890 (*q*), s. 12; and as to leases for lodging-houses, see sect. 57, sub-sect. 2.

As to leases to school boards, see the Elementary Education Act, 1870 (*r*), s. 19; and as to leases by a school board being subject to the control of the Education Department, see sect. 22.

As to the power of a library authority to hire land, see the Public Libraries Act, 1892 (*s*), s. 11.

Prior to 1819 parish officers had no estate in parish lands so as to be able to make a lease (*t*), but by the Poor Relief Act, 1819 (*u*), s. 17, the churchwardens and overseers Parish lands.

(*l*) As to leases for working men's dwellings, see sect. 111.

(*m*) As to the effect of such approval, see *Davis v. Corp. of Leicester*, 1894, 2 Ch. 208. (*n*) *Att.-Gen. v. Great Yarmouth*, 1855, 21 Beav. 625.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21.

(*p*) 38 & 39 Vict. c. 55.

(*q*) 53 & 54 Vict. c. 70.

(*r*) 33 & 34 Vict. c. 75; extended by 35 & 36 Vict. c. 27, s. 1, to any offices required by the School Board for London. And as to taking leases for public purposes, see also the Baths and Wash-houses Acts, 1846, s. 24, and 1862, s. 3; the Parochial Offices Act, 1861, s. 1; and the Poor Law Amendment Act, 1867, s. 13. (*s*) 55 & 56 Vict. c. 53.

(*t*) *Doe v. Terry*, 1835, 4 A. & E. 274; see *Phillips v. Pearce*, 1826, 5 B. & C. 433; *Doe v. Cockell*, 1836, 4 A. & E. 478. (*u*) 59 Geo. 3, c. 12.

were constituted a body corporate for the purpose of holding buildings, lands, and hereditaments belonging to the parish (*x*); and, by sect. 13, were enabled, with the consent of the inhabitants in vestry assembled, to let any part of the parish lands to any poor and industrious inhabitant to be by him cultivated on his own account at such reasonable rent, and on such terms as the vestry should fix. To grant a valid lease of lands vested in the parish officers by the Act, the churchwardens and overseers must concur (*y*), but where land was vested in trustees for the parish, the Act did not necessarily divest their estate (*z*).

Parish
councils.

In rural parishes which have a parish council the interests and powers of the parish officers in respect of parish lands, and the powers of the vestry, are now transferred to the parish council (*a*). The parish council may let any lands or buildings vested in the council, but the power of letting for more than a year is not, in the case of certain property specified in the Act, to be exercised without the consent mentioned in the Act (*b*). Where there is a parish meeting, the powers of the vestry are transferred to the meeting, and the legal interest in parish property vests in the chairman of the meeting and the overseers as a body corporate (*c*).

Letting by
public
authorities in
allotments.

50 & 51 Vict.
c. 48, s. 2.

Under the Allotments Act, 1887 (*d*), the sanitary authority of any urban or rural district—that is, as to urban districts which are boroughs the borough council, and as to other districts the urban or rural district council (*e*)—may acquire by purchase or hire land, whether within or without their district, suitable for allotments, and may let such land in allotments to persons belonging to the labouring population in the district. No allotment is to exceed one acre, save in

Sect. 7 (3), (4).

(*x*) The statute does not apply to copyhold lands: *Re Puddington Charities*, 1837, 8 Sim. 629. As to churchwardens, &c., taking land on lease for the purpose of the Act, see sects. 12, 17; and as to inclosure of waste or common land and letting to the industrious poor, see the Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42), s. 2.

(*y*) *Woodcock v. Gibson*, 1825, 4 B. & C. 462.

(*z*) *Churchwardens of Deptford v. Skitchley*, 1847, 8 Q. B. 394.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5 (2), 6 (1), 52 (4, 5), 67.

(*b*) Sect. 8 (2).

(*c*) Sect. 19.

(*d*) See Allotments Act, 1882 (45 & 46 Vict. c. 80), and the earlier provisions of the Allotments Act, 1832 (2 Will. 4, c. 42).

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21.

the case of a temporary letting of land which cannot be let in accordance with the Act and the regulations under it, and allotments may not be sub-let. A tenant of an allotment may, before the expiration of his tenancy, remove any fruit and other trees and bushes planted or acquired by him, for which he has no claim to compensation. Persons or corporations who are authorized to sell land to the sanitary authority for the purposes of the Act, may, without prejudice to any other power of leasing, lease land to the sanitary authority, without any fine or premium, for a term not exceeding thirty-five years. Sect. 7 (6).
Sect. 3 (7).

Where a sanitary authority (other than a borough council) fails in its duties as to the acquisition of land for allotments, its powers may be transferred to the county council under the Allotments Act, 1890 (*f*).

Under the Local Government Act, 1894 (*g*), parish councils may hire land and may let it in allotments under sects. 5—8 of the Allotments Act, 1887 (*h*). If the parish council cannot obtain land by agreement, the county council may make an order authorizing compulsory hiring for not less than fourteen years nor more than thirty-five years. The parish council may let to one person an allotment exceeding one acre, but if the land is hired compulsorily, not exceeding in the whole four acres of pasture, or one acre of arable and three of pasture (*i*). The county council may confer the like powers on the parish meeting (*k*). Where land vested in a parish council is let by the council for allotments, no consent or approval required under the Charitable Trusts Acts, 1853 to 1891, need be obtained (*l*).

A county council may, under the circumstances specified in the Small Holdings Act, 1892 (*m*), hire land on lease or otherwise for the purpose of letting it in small holdings in accordance with the provisions of the Act, and they may also let land purchased by them to small holders who are not able to buy. Special provision is made for leases to a county council under the Act by tenants for life (*n*). The Letting for
small
holdings.

(*f*) 53 & 54 Vict. c. 65.

(*g*) 56 & 57 Vict. c. 73, s. 10.

(*h*) *Supra*, p. 36.

(*i*) Sect. 10 (6)

(*k*) Local Government Act, 1894, s. 19 (10).

(*l*) Sect. 8 (2).

(*m*) 55 & 56 Vict. c. 31, ss. 2, 4.

(*n*) Sect. 12; *infra*, p. 45.

county council may delegate its powers in this behalf to a committee (o).

Exemptions
from
Mortmain
Acts.

Leases by deed to local authorities are subject to sect. 6 of the Mortmain and Charitable Uses Act, 1888 (p), except so much of sub-sect. 2 as requires an assurance by deed, made otherwise than in good faith and for valuable consideration, to be executed not less than twelve months before the death of the assurator (q).

(r) *Building Societies, &c.*

As to leases by and to building societies see the Building Societies Act, 1874 (r), s. 37; friendly societies, the Friendly Societies Act, 1896 (s), s. 47 (1); industrial and provident societies, the Industrial and Provident Societies Act, 1893 (t), s. 36; and trade unions, the Trade Unions Act, 1871 (u), s. 7.

(f) *Companies.*

Companies.
25 & 26 Vict.
c. 89, s. 18.
Sect. 21.

A company incorporated under the Companies Act, 1862, has power to hold lands, but no company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, can, without the sanction of the Board of Trade, hold more than two acres of land. Under this section the company can take a lease of lands (x). Power to take on lease, and to lease, real property is usually expressly conferred on the company by its memorandum of association.

(o) Sect. 16. Cf. Local Government Act, 1894, s. 6 (4).

(p) 51 & 52 Vict. c. 42. See *infra*, p. 41.

(q) Mortmain and Charitable Uses (Amendment) Act, 1892 (55 Vict. c. 11), s. 1. As to "assurance" in this Act, including leases, see sect. 2, and Act of 1888, s. 10. As to meaning of "local authority," see sect. 2.

(r) 37 & 38 Vict. c. 42.

(s) 59 & 60 Vict. c. 25.

(t) 56 & 57 Vict. c. 39.

(u) 34 & 35 Vict. c. 31.

(x) As to taking on lease and sub-letting more land than the company requires, see *Re London and Colonial Co., Horsey's Claim*, 1868, 5 Eq. 561, 562, note (1). As to the right of trustees in whose names the lease is taken to be reimbursed by the company any expenses they incur, see *Re Buckley*, 1866, 35 Beav. 449; *Re Pooley Hall Colliery Co.*, 1870, 18 W. R. 201; *Southampton Imperial Hotel Co., Hunt's Claim*, 1872, 20 W. R. 435 (claim in winding-up). The company in such a case are not liable directly to the lessor: *Walters v. Northern Coal Mining Co.*, 1855, 5 D. M. & G. 629, 640; *Cox v. Bishop*, 1857, 8 D. M. & G. 815; though they will be restrained from using the property in violation of the provisions of the lease: *Wright v. Pitt*, 1870, 12 Eq. 408.

A lease of the undertaking of a company may be sanctioned as an arrangement under the Joint Stock Companies Arrangement Act, 1870, s. 2 (*y*).

VII. TRUSTEES FOR CHARITABLE USES.

(a) *Leases by Trustees.*

By the Charitable Trusts Act, 1855, the trustees or persons acting in the administration of any charity which is within the Charitable Trusts Act (*z*) are prohibited from granting, otherwise than under the express authority of Parliament under some statute, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established (*a*), or with the approval of the Charity Commissioners, any lease of the charity estate in reversion after more than three years of any existing term or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years. A lease granted by the trustees of a charity for more than twenty-one years, without the approval of the Charity Commissioners, in contravention of the provisions of sect. 29 of the Act of 1855, is not valid for a term of twenty-one years, but is absolutely void (*b*).

Restriction on leasing by trustees.

18 & 19 Vict. c. 124. s. 29.

As to the mode of obtaining the consent of the Charity Commissioners to building, repairing, and mining leases, see Charitable Trusts Act, 1853, s. 21; and as to such leases being valid although not authorized by the terms of the trust, see sect. 26. The vesting of the charity lands in the "Official Trustee of Charity Lands" (*c*), under sect. 48 of the same Act, does not prevent the acting trustees (or a majority consisting of not less than three

16 & 17 Vict. c. 137.

(*y*) 33 & 34 Vict. c. 104; *In Re Dyaccor, &c., Collieries Co.*, 1879, 11 C. D. 605.

(*z*) For the excepted charities, see 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, ss. 47, 49. As to leases of portions of closed cemeteries, see 20 & 21 Vict. c. 81, s. 24.

(*a*) As to inserting leasing powers in a scheme, see *Re Smith's Charity*, 1882, 26 Sol. Journ. 298. The deed of foundation does not constitute a scheme "legally established," so as to enable the trustees by themselves to exercise a power of leasing contained in it: *Re Mason's Orphanage*, 1896, 1 Ch. 596.

(*b*) *B. of Bangor v. Parry*, 1891, 2 Q. B. 277.

(*c*) Sect. 15 of the Act of 1855.

persons) from granting leases and enforcing or being liable under covenants: Act of 1855, s. 16.

Leases by
trustees.

Subject to the above restrictions the trustees of a charity may grant leases of the charity estate in pursuance of the directions in that behalf given by the founder or contained in the instrument creating the charity; or, if there are no such directions, they may lease the charity estate at a rent representing the full annual value of the demised property (*d*), and for a term and upon conditions consistent with its provident management (*e*). In order to induce the Court to set aside a charity lease already existing it is not enough to say that the mode of letting is not the best that might be prescribed; it must be shown that the mode is so positively bad that no persons meaning fairly to discharge their trust would have resorted to it (*f*). A charity lease may be set aside on the mere ground of undervalue, but such undervalue must be satisfactorily proved, and must be considerable in amount (*g*). And since the case of a charity estate is one in which of all others the security of the rent is the first point to be regarded, the inadequacy of the rent reserved is less a badge of fraud than in almost any other instance (*h*). Farming leases for terms not exceeding twenty-one years have been considered proper (*i*). A building lease for a longer term than ninety-nine years cannot stand unless there be some special ground on which it can be supported (*k*).

Where the charity is in the hands of a corporation, leases of the charity lands may be subject also to the disabling statutes of Elizabeth (*l*). Accordingly, s. 38 of the Charitable Trusts Act, 1855, provides that leases authorized by the

(*d*) *East v. Ryul*, 1725, 2 P. W. 284. See *Att.-Gen. v. Morgan*, 1826, 2 Russ. 306; *Att.-Gen. v. Brooke*, 1811, 18 Ves. p. 326.

(*e*) *Att.-Gen. v. Owen*, 1805, 10 Ves. p. 560; *Att.-Gen. v. Griffith*, 1897, 13 Ves. p. 575; *Att.-Gen. v. Pargeter*, 1843, 6 Beav. 150. The trustees must not lease to one of themselves. *Att.-Gen. v. Dixie*, 1807, 13 Ves. p. 534; and a lease to a relative of a trustee is viewed with suspicion: *Ex parte Skinner*, 1817, 2 Mer. 457; *Ferraby v. Hobson*, 1847, 2 Phil. 261.

(*f*) *Att.-Gen. v. Cross*, 1817, 3 Mer. p. 540.

(*g*) *Att.-Gen. v. Cross*, 1817, 3 Mer. pp. 540, 541.

(*h*) *Ex parte Skinner*, 1817, 2 Mer. p. 457.

(*i*) *Att.-Gen. v. Owen*, 1805, 10 Ves. p. 560.

(*k*) *Att.-Gen. v. Foord*, 1843, 6 Beav. p. 290.

(*l*) *Supra*, p. 27. See *Magdalen Hospital v. Knotts*, 1879, 4 App. Cas. 324.

Charity Commissioners shall be valid notwithstanding such disabling statutes, and under s. 39 the Commissioners may prepare and approve of any scheme for the letting of the charity property, and all leases granted by the trustees or persons acting in the management of the charity, pursuant to such scheme, are valid. Words in the Acts applying to any person or individual apply also to a corporation, whether sole or aggregate (*m*), and a majority of the trustees or persons acting in the administration of a charity present at a duly constituted meeting of their body are empowered to act (*n*).

See the Allotments Extension Act, 1882 (*o*), as to the letting of lands vested in trustees for the benefit of the poor of any parish; and the Municipal Corporations Act, 1883 (*p*), s. 8, as to setting aside leases of charity lands in certain cases.

(*b*) *Leases to Trustees for Charitable Uses.*

Subject to the exemptions noticed below, a lease for the benefit of any charitable uses is void (*q*) unless it complies with the requirements of the Mortmain and Charitable Uses Act, 1888 (*r*): that is, it must be made to take effect immediately in possession (*s*): it must contain no reservation or condition for the benefit of the lessor, save only as mentioned in the Act: it must be by deed executed in the presence of at least two witnesses (*ss*); unless made in good faith for full and valuable consideration, it must be made at least twelve months before the death of the lessor; and it must within six months after execution be enrolled in the

Leases to trustees for charitable uses.

51 & 52 Vict. c. 42, s. 4.

(*m*) Act of 1855, s. 48.

(*n*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12.

(*o*) 45 & 46 Vict. c. 80.

(*p*) 46 & 47 Vict. c. 18.

(*q*) Apparently this does not apply to lands already in mortmain. See *Walker v. Richardson*, 1837, 2 M. & W. 882; *Att.-Gen. v. Glym*, 1841, 12 Sim. 84; *Ashton v. Jones*, 1860, 28 Beav. 460 (on 9 Geo. 2, c. 36).

(*r*) See *Barting v. Sargent*, 1879, 13 C. D. 330; *Churcher v. Martin*, 1889, 42 C. D. 312. For exemptions in the case of leases for religious purposes, or for the promotion of education, &c., see sect. 7; as to universities and colleges, and land assured for a public park, elementary school-house, or public museum, sect. 6; as to workmen's dwellings, the Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16); as to assurances to local authorities, *supra*, p. 38; and as to exemptions under special Acts, see *Tudor's Charitable Trusts*, ed. 1889, p. 432.

(*s*) See 26 & 27 Vict. c. 106; *infra*, p. 42.

(*ss*) See *Wickham v. Marquis of Bath*, 1865, 1 Eq. 17.

Central Office of the Supreme Court (*t*), though in certain cases the omission to enrol within the time limited may be cured (*u*). The reservations and conditions which may be made in favour of the lessor (provided the same benefits are reserved to persons claiming under the lessor as to the lessor himself) are as follows: the reservation of a pepper-corn or other nominal rent; of mines and minerals; or of any easement; covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the demised land as of any adjacent land; a right of re-entry on nonpayment of any such rent or on breach of any such covenant or provision; and other stipulations of a like nature for the benefit of the lessor or of any person claiming under him.

The foregoing provisions *primâ facie* make it impossible to grant a lease for charitable uses (*x*) at a rent other than nominal, but a lease at a substantial rent is authorized under the provision that if the assurance is made in good faith on a sale for full and valuable consideration (*y*), that consideration may consist wholly or partly of a rent reserved to the vendor with or without a right of re-entry for nonpayment. The expression "on a sale" includes the granting of a lease, the lessee being a purchaser *pro tanto* (*z*). Moreover, the practice of granting leases to charities is expressly recognized by the enactment that every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance (*a*).

(*t*) If the charitable uses of the lease are declared by a separate instrument duly enrolled, it is not necessary to enrol the lease: sect. 4 (*g*).

(*u*) Sect. 5.

(*x*) Cf. *Doe v. Hawthorne*, 1818, 2 B. & A. 96; *Webster v. Southey*, 887, 36 C. D. 9.

(*y*) See sect. 10.

(*z*) *Infra*, p. 56.

(*a*) 26 & 27 Vict. c. 106.

(2) RESTRICTIONS ARISING FROM LIMITED INTEREST.

I. TENANTS IN TAIL.

Tenants in tail can grant leases under the Fines and Recoveries Act, 1833, but where there is a protector of the settlement (*b*), his consent is necessary to make the lease effectual against remaindermen and reversioners subsequent to the estate tail. Leases under the Act must be by deed, and must be enrolled in the Enrolment Department of the Central Office (*c*) within six months after execution, except leases for a term not exceeding twenty-one years at a rack-rent, or not less than five-sixths of a rack-rent, where the term is to commence from the date of the lease or from any time not exceeding twelve months from such date. Tenants in tail also have the powers of leasing conferred upon a tenant for life by the Settled Estates Act, 1877 (*d*), and the Settled Land Act, 1882 (*e*).

Leases by tenants in tail.
3 & 4 Will. 4.
c. 74, ss. 15, 34.
Sects. 40, 41.

A lease for years by a tenant in tail, not authorized by any statutory power or by a power to lease contained in the settlement, is not absolutely determined by his death, but the issue in tail is at liberty either to affirm or avoid it as he may think fit (*g*). His affirmance may be either expressed, or implied from acceptance of rent (*h*), or from bringing an action for recovery thereof, or an action of waste (*i*). As against remaindermen after the estate tail, the lease is void (*k*).

Leases by tenants in tail not in pursuance of statutes (*f*).

II. TENANTS FOR LIFE.

Under the S. L. A. 1882 (*l*), s. 6, a tenant for life (*m*) under any settlement, whether executed before or after the

Tenants for life.
Settled Land Act, 1882, s. 6.

(*b*) See sect. 22 for definition of this phrase.

(*c*) R. S. C. Ord. 61, r. 9.

(*d*) Sect. 46. See *infra*, p. 50.

(*e*) Sect. 58 (1) (i). See *infra*, p. 44.

(*f*) For former statutory power of leasing, see 32 Hen. 8, c. 28, repealed as to leases by tenants in tail by 19 & 20 Vict. c. 120, s. 35.

(*g*) Co. Litt. 45 b; Bac. Abr. (D.) 651; *E. of Bedford's Case*, 1586, 7 Rep. 8 a.

(*h*) *Doe v. Jenkins*, 1829, 5 Bing. 469, 476; *Doe v. Rollings*, 1847, 4 C. B. 188; *Stiles v. Cowper*, 1748, 3 Atk. p. 693. See *Osborn v. D. of Marlborough*, 1866, 14 L. T. 789.

(*i*) Bac. Abr. (D.) 652.

(*k*) Co. Litt. 45 b; *Andrew v. Pearce*, 1805, 1 B. & P. N. R. 158.

(*l*) 45 & 46 Vict. c. 38.

(*m*) See sect. 2 (5)—(7).

commencement of the Act (*u*), may lease (*o*) the settled land (*p*) or any part thereof or any easement, right, or privilege of any kind over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding, (i) in the case of a building lease, ninety-nine years, (ii) in the case of a mining lease, sixty years, and (iii) in the case of any other lease, twenty-one years. A lease to be valid under the Act need not expressly refer to the Act (*q*), and apparently a tenant for life may lease in favour of his wife (*r*).

The lease must be granted by the tenant for life in the *bona fide* exercise of his power, having regard to the interests of all parties (*s*).

Requisites.
Sect. 7.

A lease under the Act must comply with the following conditions (*t*):—

(1) It must be by deed (*u*), and must be made to take effect in possession (*v*) not later than twelve months (*x*) after its date. Consequently a sub-lease for the residue of the term created by the head lease should not contain a covenant for the extension of the sub-term upon the renewal of the head lease (*y*); but upon a surrender and new grant of a head lease, the existence of an unexpired sub-lease does not prevent the new lease from taking effect in possession (*z*).

(*u*) See sect. 2 (1).

(*o*) As to the operation of the lease, see sect. 20 (1), (2).

(*p*) As to "land," see note, *supra*, p. 4; as to "settled land," see sect. 2 (3). The principal mansion-house and the park and lands usually occupied therewith cannot be leased without the consent of the trustees of the settlement or an order of the Court: S. L. A. 1890, s. 10; *Marquess of Ailsbury's S. E.*, 1892, 1 Ch. 506; 1892, A. C. 356. And so as to a lease of easements over the park: *Sutherland v. Sutherland*, 1893, 3 Ch. 169. As to what is to be deemed a principal mansion-house, see S. L. A. 1890, s. 10 (3). The order is made upon application by summons at Chambers: S. L. A. Rules, 1882, r. 2; Seton, 5th ed. 1517.

(*q*) *Mogridge v. Clapp*, 1892, 3 Ch. 382.

(*r*) *Sutherland v. Sutherland*, 1893, 3 Ch. 169, p. 196.

(*s*) Sect. 53. See *Sutherland v. Sutherland*.

(*t*) As to evidence of facts or calculations affecting the lease, see sect. 7 (5). As to protection of lessees dealing in good faith with the tenant for life, see sect. 54.

(*u*) As to the effect of the conveyance, see sect. 20.

(*v*) See *Sutherland v. Sutherland*, 1893, 3 Ch. p. 192.

(*x*) *I.e.* calendar months: Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*y*) *Re Farnell's S. E.*, 1886, 33 Ch. D. 599.

(*z*) *Re Ford's S. E.*, 1869, 8 Eq. 309.

(2) The lease must reserve the best rent (*a*) that can reasonably be obtained (*b*), regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. In estimating the best rent in the case of an agricultural holding it is not necessary to take into account against the tenant the increase in the value of the holding arising from improvements made or paid for by him (*c*). Under the item "money laid out," past voluntary expenditure cannot be taken into account; the expenditure must have direct reference to the granting of the lease (*d*).

(3) The lease must contain a covenant by the lessee for payment of the rent, and a condition of re-entry on non-payment within a time therein specified not exceeding thirty days. If the time specified exceeds this limit the lease has no effect under the Act (*e*).

(4) A counterpart is to be executed by the lessee and delivered to the tenant for life.

A tenant for life when intending to make an agreement for a lease or a lease must give notice to each of the trustees of the settlement (*g*) by registered letter, and also to the solicitor for the trustees, if known to him, not less than one month before the making of the lease or a contract for the same (*h*). The notice may be a notice of a general intention to lease (*i*). At the date of the notice the number of trustees must be not less than two, unless a contrary intention is expressed in the settlement. A person

Notice to
trustees.
Sect. 45.

(*a*) See sect. 2 (10) (ii.). As to relaxation of this requirement in the case of working men's dwellings, see the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74, and S. L. A. 1890, s. 18; and as to small holdings, the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), s. 12.

(*b*) See *Sutherland v. Sutherland*, 1893, 3 Ch. p. 195.

(*c*) Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 43.

(*d*) *Re Chawner's S. E.*, 1892, 2 Ch. p. 196.

(*e*) *Cf. Doe v. Burrough*, 1844, 6 Q. B. 229.

(*g*) That is, trustees of the settlement for the purposes of the S. L. A. See s. 2 (8); S. L. A. 1890, s. 16. As to appointment of trustees, see S. L. A. 1882, s. 38; and of new trustees, Trustee Act, 1893, s. 47.

(*h*) *Re Bentley, Wade v. Wilson*, 1885, 54 L. J. Ch. 782. Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice: S. L. A. 1884, s. 5 (3).

(*i*) S. L. A. 1884, s. 5 (1).

dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice (*k*); and, in the case of a lease where no fine is taken, it seems that the lessee need not inquire as to the existence of trustees (*l*), though in the case of a purchase or of a lease at a fine (which is capital money (*m*)) there must be trustees at the time of completion to receive the purchase-money or fine (*n*). But the Court will restrain the granting of the lease till trustees have been appointed and notice given (*o*); and it seems that the lease will be bad if the lessee actually knows that there are no trustees (*p*). The trustees to whom notice is given incur no liability by remaining passive (*q*). If a difference arises between them and the tenant for life respecting the exercise of the power of leasing or any matter relating thereto, either party is at liberty to apply (*r*) to the High Court for directions (*s*).

Leases not
exceeding
twenty-one
years.
Settled Land
Act, 1890, s. 7.

In the case of leases not exceeding twenty-one years, provided the rent is the best that can be reasonably obtained without fine, and that the lessee is not exempted from punishment for waste (*ss*), the following relaxation of the above provisions is allowed:—No notice need be given under sect. 45 of the Act of 1882; there need not be any trustees of the settlement for the purposes of the S. L. Acts; and the lease may be by writing under hand, with an agreement in lieu of a covenant for payment of rent, provided the term does not extend beyond three years from the date of the writing.

Surrenders
and contracts.
Settled Land
Act, 1882,
s. 13.

A tenant for life may accept surrenders of leases (*t*), and may grant new leases (*t*). On a surrender of a lease in respect of a part only of the land or of the mines and minerals leased, the rent may be apportioned (*u*). He may

(*k*) See *Duke of Marlborough v. Sartoris*, 1886, 32 C. D. p. 623.

(*l*) *Mogridge v. Clapp*, 1892, 3 Ch. 382.

(*m*) S. L. A. 1884, s. 4.

(*n*) *Hatten v. Russell*, 1888, 38 C. D. 334.

(*o*) *Wheelwright v. Walker*, 1883, 23 C. D. 752; *Mogridge v. Clapp*, 1892, 3 Ch. p. 400.

(*p*) *Hughes v. Fanagan*, 1891, 30 L. R. Ir. 111. (*q*) Sect. 42.

(*r*) By summons in Chambers: S. L. A. Rules, 1882, r. 2.

(*s*) Sect. 44. There is no provision ensuring a trustee who applies his costs of the application.

(*ss*) See *infra*, p. 50, note (*k*).

(*t*) S. L. A. 1882, s. 13. See *Easton v. Penny*, 1892, 67 L. T. 290.

(*u*) Sect. 13 (2).

also contract for leases and for surrenders of contracts for leases, and such contracts will bind his successors in title (*r*). Similarly a tenant for life can give effect to a contract for a lease made by his predecessor in title, or to a covenant for renewal, where such lease, if made by the predecessor, would be binding on the successor, or where such covenant could be enforced against the owner for the time being of the settled land (*r*); and can confirm a void or voidable lease provided the lease when confirmed is such as might at the date of the original lease have been lawfully granted under the Act or otherwise (*r*).

The provisions of the S. L. Act do not abridge other powers for the time being subsisting under a settlement (*y*); but, save in the case of settlements within the meaning of sect. 63 (*z*), the consent of the tenant for life (*a*) is required for their exercise for any purpose provided for in the Act (*b*). Where there is an order granting a power of leasing under the Settled Estates Act, 1877, an order should be obtained staying such existing order before the powers of the S. L. Acts are exercised (*c*).

Effect of S. L. Act, 1882, on powers.

Special provision is made by sect. 8 of the S. L. A. 1882, as to the terms on which building, repairing (*d*), and improving (*e*) leases may be granted. A nominal rent may be reserved for the first five years, and, subject to certain restrictions, where the land is contracted to be leased in lots, the entire rent may be apportioned among the various lots (*f*). Under sect. 2 of the S. L. A. 1889, a building lease or agreement may be granted with an option of purchase, subject to the provisions of the section. On the grant of a building lease the tenant for life may cause parts of the settled land to be laid out for streets, squares, gardens, or other open spaces, with drains, &c. (*g*).

Building leases.

Sect. 8.

(*r*) Sect. 31. See *Davis v. Harford*, 1882, 22 C. D. 128.

(*s*) Sect. 12. *Re Kenegys-Tynte*, 1892, 2 Ch. 211.

(*y*) Sects. 56, 57. (*z*) S. L. A. 1884, s. 6 (1). See *infra*, p. 49.

(*a*) Or, where two or more persons constitute the tenant for life, the consent of any one of them; S. L. A. 1884, s. 6 (2).

(*b*) *Re Atherton*, W. N. 1891, p. 85.

(*c*) *Re Pool's Settlement*, 1884, 50 L. T. 585.

(*d*) *Truscott v. Diamond Rock Boring Co.*, 1882, 20 C. D. 251; *Re Daniell's S. E.*, 1894, 3 Ch. 503.

(*e*) See sect. 2 (10) (iii).

(*f*) As to leases of lots after the agreed rent has been already secured by the earlier leases, see *Re Sabin*, W. N. 1885, p. 197.

(*g*) S. L. A. 1882, s. 16.

Mining leases.
Sect. 9.

In mining leases (*h*) the rent may, under sect. 9 of the S. L. A. 1882, be made to vary with the acreage worked or the quantity or price (*i*) of the minerals worked, and a fixed or minimum rent may be reserved. The lease may also be made partly in consideration of the execution of improvements authorized by the Act for mining purposes (*k*). Unless a contrary intention is expressed in the settlement (*l*), a proportion of the rent—three-fourths if the tenant for life is impeachable for waste in respect of minerals (*m*); otherwise one-fourth—must be set aside as capital (*mm*).

Sect. 10.

The statutory terms of building and mining leases may, by order of the Court (*n*), be varied where such variation is required by local custom, or where it would be difficult to adopt the statutory terms.

Power to
grant to
copyholders
licences for
leasing.
Sect. 14.

A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is empowered by the Act to make of freehold land. The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments. The licence must be entered on the court rolls of the manor.

Persons
having
the powers
of a tenant for
life.

Settled Land
Act, 1882,
s. 58.

Each of the following persons, when his estate or interest is in possession (*p*), has the powers of leasing conferred on a tenant for life (*q*) by the S. L. A. 1882:—(i) a tenant in tail (special provision being made with respect to tenants in tail who are restrained by statute from barring the estate tail); (ii) a tenant in fee simple with an executory limitation

(*h*) Cf. S. L. A. 1882, s. 2 (10) (ii.) (iv.). And as to dealing separately with the surface and the minerals, see sect. 17 (1).

(*i*) S. L. A. 1890, s. 8.

(*k*) See sect. 25 (xix.).

(*l*) *D. of Newcastle's Estates*, 1883, 24 C. D. 129; *Re Bayot's Settlement*, 1894, 1 Ch. 177, p. 184.

(*m*) *Re Ridge*, 1885, 31 C. D. 504.

(*mm*) Sect. 11.

(*n*) S. L. A. Rules, 1882, r. 9. See Seton, 5th ed. p. 1514. As to application on behalf of an infant having the powers of a tenant for life, see *Cecil v. Langdon*, 1886, 54 L. T. 418.

(*p*) See *Re Atkinson*, 1886, 31 C. D. p. 580; *Re Morgan*, 1883, 24 C. D. p. 116; *Re Jones*, 1884, 26 C. D. p. 744; *Re Clitheroe Estate*, 1885, 31 C. D. 135; *Re Strangways*, 1886, 34 C. D. 423.

(*q*) Where in the events which happen the estate devolves upon the heir-at-law of the settlor for his life, see *Re Atherton*, W. N. 1891, 85.

over on failure of his issue or in any other event (*r*) ; (iii) a person entitled to a base fee ; (iv) a tenant for years determinable on life, not holding merely under a lease at a rent (*s*) ; (v) a tenant for the life of another, not holding merely under a lease at a rent ; (vi) a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation (*t*), or otherwise, or to be defeated by an executory limitation over, or is subject to a trust for accumulation of income for payment of debts or other purposes (*u*) ; (vii) a tenant in tail after possibility of issue extinct ; (viii) a tenant by the curtesy (*x*) ; and (ix) a person entitled to the income of land under a trust or direction for payment thereof to himself during his own or any other life, whether subject to expenses of management or not (*y*), or until sale of the land, or until forfeiture of his interest on bankruptcy or other event.

Land which is subject to a trust or direction for sale and for the application of the income till sale for the benefit of any person for life, whether absolutely or subject to restriction, is deemed to be settled land : the instrument under which the trust arises is deemed to be a settlement (*z*) : the person beneficially entitled to the income is deemed tenant for life ; and the trustees for sale are for the purposes of the Act trustees of the settlement (*a*). Consequently the tenant for life, as thus defined, has the statutory power of leasing, and is, in general, entitled to be let into possession (*b*). But in order to avoid a conflict between the powers of the tenant for life and the trustees, the tenant for life cannot exercise his powers under sect. 63 without the leave of the

Settlement
by way of
trust for sale.
Settled Land
Act, 1882.
s. 63.

(*r*) See Conveyancing Act, 1882, s. 10.

(*s*) *Re Hazle's S. E.*, 1885, 29 C. D. 78.

(*t*) *Re Pugh's S. E.*, 1885, 30 C. D. 161.

(*u*) *Williams v. Jenkins*, 1893, 1 Ch. 700. *Cf. Re Strangways*, 1886, 34 C. D. 423.

(*x*) *Mogridge v. Clapp*, 1892, 3 Ch. 382. See S. L. A. 1884, s. 8.

(*y*) *Re Jones*, 1884, 26 C. D. 736 ; *Re Clitheroe Estate*, 1885, 31 C. D. 135 ; *Clarke v. Thornton*, 1887, 35 C. D. p. 311 ; but a discretionary trust for payment is not sufficient : *Re Atkinson*, 1886, 31 C. D. 577. *Cf. Re Horne's S. E.*, 1888, 39 Ch. 84.

(*z*) See *Re Earle and Webster's Contract*, 1883, 24 C. D. 144 ; *Re Ridge*, 1885, 31 C. D. 504.

(*a*) For a case where the section was held not to apply, the trust for sale being postponed, see *Re Horne's S. E.*, 1888, 39 C. D. 84.

(*b*) *Re Bagot's Settlement*, 1894, 1 Ch. 177.

Court, and while the order giving leave is in force, any trust or power for the same purpose cannot be executed (*c*). But, before such order, the trustees can execute the trust without the consent of the tenant for life, notwithstanding sect. 56 of the S. L. A. 1882 (*d*). Thus a lease cannot be made by a tenant for life of proceeds of sale under a trust for sale except with the sanction of the Court (*e*).

Powers of
tenant for
life under
Settled
Estates Act,
1877, s. 46.

Under the Settled Estates Act, 1877 (*f*), persons entitled to the possession (*g*) or to the receipt of the rents and profits of any settled estates for an estate for any life (*h*), or for a term of years determinable with any life or lives, or for any greater estate, under a settlement made since November 1st, 1856 (sect. 57), unless the settlement contains an express declaration to the contrary, and also any person entitled to the possession or to the receipt of the rents and profits of any unsettled estate as tenant by the curtesy or in dower, may, without any application to the Court, demise the same or any part thereof, except the principal mansion-house and demesnes and other lands usually occupied therewith.

Requisites for
leases.

The term must not exceed twenty-one years for estates in England, and thirty-five years in Ireland, and the lease must take effect in possession at or within one year next after the making thereof. Every such demise must be made by deed at the best rent that can reasonably be obtained (*i*), without any fine or other benefit in the nature of a fine, and the rent must be incident to the immediate reversion. The demise must not be made without impeachment of waste (*k*); it must contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of not less than twenty-eight days; and a counterpart must be executed by the lessee (*l*).

(*c*) S. L. A. 1884, s. 7.

(*d*) Sect. 6 (1).

(*e*) *Re Daniell's S. E.*, 1894, 3 Ch. 503.

(*f*) 40 & 41 Vict. c. 18.

(*g*) See *Taylor v. Taylor*, 1875, 20 Eq. 297.

(*h*) A tenant in tail after possibility of issue extinct is to be deemed to be a tenant for life. See s. 2. (*i*) *Re Rawlins' Estate*, 1865, 1 Eq. 286.

(*k*) Hence it must not exempt the lessee from liability for "fair wear and tear and damage by tempest": *Davies v. Davies*, 1888, 38 C. D. 499. See Article in 37 Sol. Journ. p. 76.

(*l*) See also sects. 47, 48. As to licences to copyhold tenants to grant leases, see sect. 9. This Act is still occasionally useful, as where there are no trustees for the purpose of the S. L. Acts.

Leases by a tenant for life, not authorized by any statutory power or by a power contained in the settlement, are valid during the life of the lessor (*m*), even though his estate comes to an end by forfeiture or surrender (*n*), but on his decease become absolutely void (*o*), and incapable of confirmation by the succeeding owner (*p*). But a new tenancy from year to year may be created by his acceptance of rent from the tenant (*q*), and where the succeeding owner has knowingly permitted or encouraged the lessee to expend money in improvements on the premises, he will not be allowed to eject the lessee (*r*).

Leases by tenants for life not in pursuance of statutes.

As to leases by tenants for terms of years, see *Underleases*, *infra*, Chap. IV., sect. 13.

III. LEASES BY THE COURT.

The Settled Estates Act, 1877 (*s*), empowers the Court (*t*), if it shall deem it proper and consistent with a due regard to the interests of all parties entitled under the settlement, to authorize leases (sect. 4), or preliminary contracts for leases (sect. 8), either of the whole or any parts (sect. 6), of any settled estates, or of any rights or privileges over or affecting any settled estates (*u*), for any purpose whatsoever, whether involving waste or not, subject to the conditions specified in the Act (*x*).

Leases by the Court.
Settled Estates Act, 1877.

Every such lease must be made to take effect in possession at or within one year after the making thereof, and

Requisites for leases.

(*m*) *Brugge v. Wiseman*, 1615, 1 Brown. & G. 22. As to agreements for leases by a tenant for life in excess of his power, see *infra*, p. 56.

(*n*) *Sutton's Case*, 1701, 12 Mod. 557.

(*o*) *Doe v. Butcher*, 1778, 1 Dougl. 50; *Doe v. Archer*, 1796, 1 B. & P. 531; *Roe v. Ward*, 1789, 1 H. Bl. 96. But under 14 & 15 Vict. c. 25, the tenant at rack rent of a farm, whose tenancy determines by the death of his landlord, is entitled, instead of emblements, to hold the farm till the expiration of the current year of the tenancy: *Infra*, p. 498.

(*p*) *Ludford v. Barber*, 1786, 1 T. R. 90; *James v. Jenkins*, 1757, Bull. N. P. 96 b; *Jenkins v. Church*, 1776, Cowp. 482.

(*q*) *Smith v. Wallake*, 1877, 3 C. P. D. 10; *Doe v. Watts*, 1797, 7 T. R. 83. See *infra*, Chap. II., sect. 3.

(*r*) *Stiles v. Cooper*, 1748, 3 Atk. 692. See *Dann v. Sparrier*, 1802, 7 Ves. 231, 235; *Pilling v. Armitage*, 1806, 12 Ves. 78, 88.

(*s*) 40 & 41 Vict. c. 18.

(*t*) I.e. the Chancery Division of the High Court; and also as to estates within their respective jurisdictions, the Palatine Courts of Lancaster and Durham, sect. 44; 52 & 53 Vict. c. 47, s. 10.

(*u*) See the definition of "settlement" and "settled estates" in sect. 2.

(*x*) See sect. 48 as to evidence of execution of counterpart by lessee.

the term created must not exceed: for an agricultural or occupation lease, twenty-one years in England and thirty-five years in Ireland; for a mining lease, or a lease of water-mills, way-leaves, water-leaves, or other rights or easements, forty years; for a repairing lease, sixty years; and for a building lease, ninety-nine years. But any such lease (except an agricultural lease) may be for such term as the Court directs, where the Court is satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant the lease for a longer term than the term hereinbefore specified in that behalf; though the Court may not authorize any lease which could not have been authorized in the settlement by the settlor (sect. 39), or where a private Bill for the same purpose has been rejected by Parliament (sect. 32) (*y*).

IV. LEASES UNDER POWERS.

Leases under powers.

Settlements and wills often expressly empower tenants in tail or for life, or trustees (*z*), to grant leases. To these powers of leasing there are generally attached conditions and restrictions which must be carefully observed by the person exercising the power, or the lease made under it will be void as against persons entitled in remainder or reversion (*a*), except in the cases provided for by the statutes mentioned hereafter. And, apart from express restrictions, a lease made upon improper terms may be void as a fraudulent or unfair execution of the power (*b*). Leases not made

(*y*) See sect. 4 as to the other conditions to be observed. As to best rent see *Re Rawlins' Estate*, 1865, 1 Eq. 286. As to capitalizing part of a mining rent, sects. 4, 34; *Re Maynard*, 1899, 43 Sol. Journ. 676; as to surrender and renewal of leases, sect. 7; *Easton v. Penny*, 1892, 67 L. T. 290; as to approving particular lease or vesting general power of leasing in trustees, sects. 10, 13; *Re Houghton's Estate*, W. N. 1894, p. 20; as to execution of lease, sect. 12; and as to its validity, sect. 40. *Cf.* Conveyancing Act, 1881, s. 70 (1), (2). The settlement can by express declaration exclude the powers of the Act, sect. 38; *Re Peake's S. E.*, 1893, 3 Ch. 430. As to leases of copyholds, sect. 56; *Easton v. Penny*, *supra*. And as to procedure, sects. 11, 23—31, 41.

(*z*) Where a power is given to trustees who disclaim, it cannot be exercised by the heir-at-law on whom the estate devolves: *Robson v. Flight*, 1865, 4 D. J. & S. 608.

(*a*) *Doe v. Cavan*, 1794, 5 T. R. 567. Though supported at law by the legal estate in the trustees, the lease will be bad in equity as a breach of trust: *Bowes v. East London Waterworks Co.*, 1818, 3 Mad. 375, 383; Jac. 324. And as to conformity between the lease and the power see *Doe v. Wilson*, 1822, 5 B. & A. 363.

(*b*) *Taylor v. Horde*, 1757, 1 Burr. p. 125.

in accordance with the terms of the power are good, however, as between the parties to them, by way of estoppel (c).

In the construction of powers the intention of the parties is to prevail (d); but, subject to this, it seems that the restraint of the power is to be taken strictly against the tenant for life, and liberally for the remainderman (e).

Construction
of powers.

The restrictions contained in powers of leasing have reference to—

(1) *The property allowed to be leased.*—Under a power to lease “lands usually demised,” it seems that lands which have not been in lease within twenty years previously cannot be demised (f). But lands which have been previously leased, although not before leased together, may be included in the same lease (g). Where in a settlement there was a power to let any part of the settled estates “so as the usual rents” were reserved, a lease of tithes which had never before been let was held void (h). A power to lease lands “or any part thereof” will not authorize a lease of part of the lands with a right or easement over the rest (i).

If the power does not mention mines, a lease may be made of open mines, but not of unopened mines; if the power specifies mines, and there are any open mines on the lands, then such open mines only can be leased; but if there are no open mines on the lands, then a lease may be made of unopened mines (k).

(2) *The kind of lease to be granted.*—Under a power to grant building leases, a mere repairing lease, not containing any obligation to build, will be invalid (l). Under a power to grant repairing leases, a lease containing the ordinary covenants to repair and to deliver up in repair will be valid without any express covenant to spend a particular

(c) *Yellowly v. Gower*, 1855, 11 Ex. 274. See *infra*, p. 74.

(d) *Pomery v. Partington*, 1790, 3 T. R. 665; as to the construction of powers to lease, see Sug. Powers, Ch. 18; *Fivian v. Jegon*, 1868, L. R. 3 H. L. 285.

(e) *Orby v. Mohun*, 1706, Gilb. Eq. R. p. 58.

(f) Sug. Powers, 728. See Co. Litt. 44 b.

(g) *Doe v. Stephens*, 1846, 6 Q. B. 208; *Doe v. Rendle*, 1814, 3 M. & S. 99.

(h) *Pomery v. Partington*, 1790, 3 T. R. 665.

(i) *Dayrell v. Hoare*, 1840, 12 A. & E. 356.

(k) *Clegg v. Rowland*, 1866, 2 Eq. 160. Farwell on Powers, 2nd ed., p. 602; MacSwinney on Mines, 2nd ed., p. 184.

(l) *Jones v. Farnby*, 1739, Willes, 169; *Hallett to Martin*, 1883, 24 C. D. 624.

sum in repairs (*m*). In a case where the tenant for life was authorized to grant such mining lease as he should think proper, it was held that he might grant a lease at a peppercorn rent by way of mortgage for securing a sum paid to himself (*n*).

(3) *The length of lease to be granted*.—Under a power to lease for not exceeding twenty-one years, or for three lives, a lease cannot be made for ninety-nine years determinable on three lives (*o*). Of course a lease may be made for a less interest than, but of the same nature as, that specified in the power (*p*). And under a power to lease for not exceeding twenty-one years a lease may be made for twenty-one years determinable at seven or fourteen years at the option of either lessor or lessee (*q*). Where under a similar power a lease had been granted for twenty-six years, it was held valid for twenty-one (*r*).

If no term is mentioned in the power, the provisions of the instrument creating the power will be looked at to see whether any intention appears as to the length of leases to be granted (*s*).

(4) *The rent to be reserved*.—Under a power to lease “at the best rent,” of course no fine nor anything in the nature of a fine can be taken on the lease. One criterion as to whether the best rent has been obtained is whether the lessor has got as much for his successors as he has for himself; if he has got more for himself than for his successors, that is decisive evidence against him (*t*). But even if the lease is fair in this respect it will be invalid if it does not reserve the best rent which a prudent owner could obtain. The lessor need not accept the highest offer of rent. It is proper to have regard to other considerations, such as the solvency and eligibility of the tenant (*u*), but a lease must not be

(*m*) *Easton v. Pratt*, 1863, 2 H. & C. 676; *Truscott v. Diamond Rock Boring Co.*, 1882, 20 C. D. 251. (*n*) *Mostyn v. Lancaster*, 1883, 23 C. D. 583.

(*o*) *Roe v. Prideaux*, 1808, 10 East, 158.

(*p*) *Isherwood v. Oldknow*, 1815, 3 M. & S. 382.

(*q*) *Edwards v. Millbank*, 1859, 4 Drew. 606; *Muskerry v. Chinnery*, 1835, 1 L. & Goo. 229. But see *Low v. Swift*, 1814, 2 Ball & B. 536.

(*r*) *Campbell v. Leach*, 1775, 2 Amb. 740.

(*s*) *Vician v. Jegon*, 1867, L. R. 2 C. P. 422, L. R. 3 H. L. 285. See *Sheehy v. Muskerry*, 1848, 1 H. L. C. 576.

(*t*) *Montgomery v. E. of Wmss*, 1817, 5 Dow, p. 344.

(*u*) *Doc v. Radcliffe*, 1808, 10 East, 278; *Dyas v. Cruise*, 1845, 2 Jo. & Lat. 460, 482.

granted at less than the best rent in consideration of the tenant's executing improvements on the demised property (*x*). The rent must be reserved at the same rate throughout the whole term granted by the lease (*y*).

Under a power to grant a lease containing "usual covenants," the covenants to be inserted are, it is conceived, such as would be inserted in a lease which is stipulated to contain such covenants (*z*). If the power requires that the lessee shall not be made dispunishable for waste, a covenant by the lessor to keep a part of the premises in repair renders the lease invalid, since it impliedly permits the lessee not to repair (*a*).

A power to grant leases "to any person or persons" the trustees should think fit authorizes a lease to a limited company (*b*).

Unless the power expressly or impliedly (*c*) authorizes leases in reversion, the lease must be made to begin at once (*d*), and, it would seem, must be made to take effect in possession (*e*); but the lease may contain a covenant for renewal, and when the time for renewal comes a fresh lease may be granted according to the covenant, provided the terms as to rent and otherwise are then proper for a lease granted in pursuance of the power (*f*). So an agreement for a new lease made before the expiration of the old lease is good (*g*). A lease is treated as a lease in possession although the premises are occupied by tenants at will or yearly tenants, if they are directed by the lessor to pay their rents to the lessee (*h*).

Lease must be in possession.

(*x*) *Roe v. Archbishop of York*, 1805, 6 East, 86. But see *Shannon v. Bradstreet*, 1803, 1 Sch. & Lef. 52, p. 72.

(*y*) *Doe v. Harvey*, 1823, 1 B. & C. 426.

(*z*) See *infra*, p. 150. Cf. *Morris v. Rhylhyddfed Colliery Co.*, 1858, 3 H. & N. 885.

(*a*) *Yellowly v. Gower*, 1855, 11 Ex. 274. As to permitting tenant to pull down outbuildings and use the material for rebuilding, see *Doe v. Stephens*, 1844, 6 Q. B. 208.

(*b*) *Re Jeffcock's Trusts*, 1882, 51 L. J. Ch. 507. (*c*) Sug. Powers, 754.

(*d*) *Sussex v. Wroth*, 1582, Cro. Eliz. 5; 6 Rep. 33 a; *Shecomb v. Hawkins*, 1613, Cro. Jac. 318; *Bowes v. East London Waterworks*, 1821, Jac. p. 330.

(*e*) Sug. Powers, 772.

(*f*) *Gas Light and Coke Co. v. Tourse*, 1887, 35 C. D. 519; *Dyas v. Cruise*, 2 Jo. & Lat. 460, p. 486; though see *Harnett v. Yeilding*, 1805, 2 Sch. & Lef. 549.

(*g*) *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; *Dowell v. Dew*, 1842, 1 Y. & C. C. C. 345.

(*h*) *Goodtitle v. Funnell*, 1781, 2 Doug. 565.

No confirma-
tion of void
lease.

If the lease is void, it is, according to the ordinary rule, incapable of confirmation (*i*), and acceptance of rent by the remainderman does no more than create a tenancy from year to year on the terms of the lease; and this is the case whenever the lease is derived out of an estate of freehold merely, as when it is granted by a tenant for life. But if the lease is granted by a tenant in tail, and so derived out of an estate of inheritance, it is not void, but voidable, and acceptance of rent by the remainderman will operate as a confirmation (*j*). A tenant for life who agrees to grant a lease beyond the limits of his power is bound to grant a lease for his own life (*k*), and, it seems, to allow compensation (*l*).

Relief in
equity against
defective
execution of
power.

Where a lease granted in purported exercise of a power is void at law through failure to comply with any mere formality required by the power, equity will interpose and secure for the lessee a valid lease under the power (*m*). This is in accordance with the general principle that equity assists the defective execution of a power, as opposed to its non-execution (*n*), where the person seeking relief is a purchaser for value (*o*), a lessee (including, probably, a lessee at rack rent) being a purchaser *pro tanto*, and so falling within this category (*p*). Moreover an agreement by a tenant for life to grant a lease under the power will be enforced after his death against the remainderman (*q*), provided it was binding on the tenant for life (*r*). But where there is no binding contract the lessee cannot, as against the remainderman, obtain specific performance on the ground of part performance (*s*), unless the remainderman lies by after

(*i*) Co. Litt. 295 b; *Doc v. Watts*, 1797, 7 T. R. 83; *Bowes v. East London Waterworks*, 1821, Jac. p. 331.

(*j*) See Bac. Abr. (D.) 651.

(*k*) Cf. *Dyas v. Cruise*, 1845, 2 Jo. & Lat. 460; *Byrne v. Acton*, 1721, 1 Bro. P. C. 186. (*l*) *Leslie v. Croomelin*, 1867, 2 Ir. R. Eq. 134.

(*m*) *Doc v. Weller*, 1798, 7 T. R. p. 480; *Clark v. Smith*, 1842, 9 C. & F. p. 141; Sug. Powers, p. 564 *et seqq.*

(*n*) See *Shannon v. Bradstreet*, 1803, 1 Sch. & Lef. p. 62.

(*o*) Notes to *Tollet v. Tollet*, 1728, 2 Wh. & T. 7th ed. 289.

(*p*) *Long v. Rankin*, 1822, Sug. Powers, p. 900; *Campbell v. Leach*, 1775, 2 Amb. 740; *Re King's Leaschold Estates*, 1873, 16 Eq. p. 525. Cf. *Donnell v. Church*, 1842, 4 Ir. Eq. R. 630; Sug. Powers, p. 567.

(*q*) *Shannon v. Bradstreet*, 1803, 1 Sch. & Lef. 52; *Dowell v. Dew*, 1842, 1 Y. & C. C. C. 345.

(*r*) *Morgan v. Milman*, 1853, 3 D. M. & G. 24; *Kenyon v. Murphy*, 1879, 6 L. R. Ir. 108. See 8 L. R. Ir. 285.

(*s*) *Shannon v. Bradstreet*, 1 Sch. & Lef. p. 72.

the death of the tenant for life, and suffers the lessee to continue the expenditure of money on the estate (*t*).

A contract by the tenant for life to grant a lease under the power may be carried out by trustees after his death (*u*). But equity will not aid a defective execution of a statutory power (*x*), nor will it interpose where there has been a substantial departure from the terms proper for a lease under the power, as where the best rent has not been reserved, or there has been an agreement to grant a lease *in futuro* (*y*); or a necessary consent has not been obtained (*z*); or where, under a power to lease with usual covenants, an unusual covenant, *e.g.* "in case of fire the lessor to rebuild or the lessee may quit," has been inserted (*a*).

Relief against the defective execution of powers of leasing is given by the Leases Act, 1849, as amended by the Leases Act, 1850. Under sect. 2 of the former Act, where a lease, which is invalid against the remainderman by reason of some failure to comply with the terms of the power, has been made *bonâ fide* and the lessee has entered thereunder (*b*), it operates in equity as a contract for a grant, at the request of the lessee, of a corresponding valid lease under the power; but the lessee is not entitled to a new lease with a variation if the remainderman is willing to confirm the existing lease without variation. On the other hand, under this Act the lessee was not bound to take a valid lease. Under the Act of 1850 this was altered, and the lessee was bound to accept from the remainderman a confirmation of the existing lease, such confirmation to be by memorandum or note in writing signed by the parties or their agents (*c*). And with regard to confirmation in other cases, the Act of 1850, repealing sect. 3 of the Act of 1849, prevented mere acceptance of rent from operating as a confirmation, and by sect. 2 imposed the condition that upon or before the acceptance of rent a memorandum or note in writing confirming the lease must be signed by the person

Statutory relief.

12 & 13 Vict. c. 26 : 13 & 14 Vict. c. 17.

(*t*) *Stiles v. Corper*, 1748, 3 Atk. 692.

(*u*) *Davis v. Harford*, 1882, 22 C. D. 128.

(*x*) *Darlington v. Pulteney*, 1775, Cowp. p. 267.

(*y*) *Sug. Powers*, 568. See *Campbell v. Leach*, 1775, 2 Amb. 740.

(*z*) *Lawrenson v. Butler*, 1802, 1 Sch. & L. 13.

(*a*) *Medwin v. Sandham*, 1789, 3 Swansl. 685.

(*b*) See *Moffett v. Gough*, 1878, 1 L. R. Ir. 331.

(*c*) Act of 1850, s. 3.

accepting the rent or his agent (*d*). The result of these enactments is that the lessee is entitled to have either a lease under the power or a confirmation of the invalid lease, but the remainderman can elect in favour of confirmation, and, if he does so elect, the lessee must accept the confirmed lease, but the confirmation must be in writing (*e*). The Leases Act, 1849, also provides for the validating of leases, granted in the intended exercise of a power of leasing, which are invalid at the time they are granted, but which the grantor subsequently becomes capable of granting under the power (*f*); and leases granted by the donee of the power, although not referring to it, are deemed to be granted in intended exercise of the power, if they cannot otherwise have effect (*g*). The Act does not extend to leases by ecclesiastical corporations or charities (*h*).

The Leases Act, 1849, will not validate a lease which in its actual form could not be granted under the power—as a building lease invalid through want of a covenant to build—by turning it into a lease of a substantially different kind (*i*), nor will it assist a lease made by a stranger to the power (*k*).

A lease by deed attested by two witnesses is a valid execution of the power, notwithstanding that some further or other formalities relating to execution and attestation are expressly required by the terms of the power (*l*).

V. TRUSTEES AND PERSONAL REPRESENTATIVES.

Trustees.

Trustees, who are not expressly empowered to lease, will be justified in letting the trust property from year to year where such letting is advantageous to the estate and necessary to prevent loss or deterioration (*m*). Possibly, too,

(*d*) See *Ex parte Cooper*, 1864, 34 L. J. Ch. 378.

(*e*) See Sug. Powers, p. 571.

(*f*) Sect. 4.

(*g*) Sect. 5.

(*h*) Sect. 7.

(*i*) *Hallett to Martin*, 1883, 24 C. D. 624. Cf. *Gas Light and Coke Co. v. Towse*, 1887, 35 C. D. p. 539.

(*k*) *Ex parte Cooper*, 1865, 2 Dr. & Sm. 312, p. 320.

(*l*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12.

(*m*) See the judgment of Little, V.-C. [of the Duchy of Lancaster] in *Oceanic Steam Navigation Co. v. Sutherland*, 1880, 16 C. D. p. 239; and the judgment of Jessel, M.R., in that case at p. 243.

trustees can grant leases of reasonable duration, consistent with the fair management of the estate (*n*), such as a lease for ten years (*o*); but this has been doubted (*p*). At any rate a trustee is not justified in granting a mining lease, since this involves the abstraction of a part of the settled property (*q*). Trustees holding two distinct properties upon different trusts cannot, except perhaps under very special circumstances, and with special provisions for the protection of the interests of each estate, grant one lease comprising the whole of such properties (*r*).

A lease granted for too long a term to a lessee who has notice of the trusts will be set aside (*s*).

Prima facie a trust for sale is inconsistent with granting a lease, but there may be circumstances which justify trustees for sale in departing from the words of the trust (*t*); for instance, perhaps, where they have endeavoured without success to sell the property by public auction and by private contract (*u*). It is a breach of trust for a trustee to grant a lease containing an option to the lessee to purchase the demised property at a future time at a fixed price (*x*).

As in the case of other joint tenants (*y*), all the trustees must join in granting the lease.

A person in whom a lease is vested, whether as original lessee or as assignee, is directly liable to the lessor, notwithstanding that he holds only as trustee (*z*), and the lessor is in general confined to his legal remedy by distress

Liability of trustees.

(*n*) See *Att.-Gen. v. Owen*, 1805, 10 Ves. p. 560; and per Lord Erskine, C., in *Middleton v. Dodswell*, 1806, 13 Ves. p. 268.

(*o*) *Naylor v. Arnitt*, 1830, 1 Russ. & M. 501; *Fitzpatrick v. Waring*, 1882, 11 L. R. Ir. 35; *Lewin on Trusts*, 9th ed. 670. See as to repairing leases of property vested in trustees, *Newton v. Lucas*, 1845, cited 10 Beav. 543.

(*p*) *Wood v. Pattenon*, 1847, 10 Beav. 541; *Re Shaw's Trusts*, 1871, 12 Eq. 124.

(*q*) *Wood v. Pattenon*, *supra*.

(*r*) *Tolson v. Shoard*, 1877, 5 C. D. 19, 25.

(*s*) *Malpas v. Ackland*, 1827, 3 Russ. 273.

(*t*) *Evens v. Jackson*, 1836, 8 Sim. 217, 218. See *Nicholls v. Corbett*, 1865, 24 Beav. 376.

(*u*) See the circumstances in *Evens v. Jackson*, 8 Sim. 217; also the judgment of Jessel, M.R., in *Oceanic Steam Navigation Co. v. Sutherland*, 1880, 16 C. D. at p. 243.

(*x*) *Oceanic Steam Navigation Co. v. Sutherland*, 1880, 16 C. D. 236. See *Clay v. Rufford*, 1852, 5 De G. & Sm. 768, 779. And similarly as to a lease containing a covenant for renewal at a fixed rent: *Salmon v. Sopwith*, 1877, 35 L. T. 826.

(*y*) *Infra*, p. 63.

(*z*) *White v. Hunt*, 1870, L. R. 6 Ex. 32.

or action against the trustee, and cannot sue the beneficiaries (*a*), though under special circumstances an account has been directed against a company beneficially interested in a mining lease (*b*).

Executors
and adminis-
trators.

It has been said that executors and administrators, as they may dispose absolutely of terms for years vested in them in right of their testators or intestates, so may they lease the same for any fewer number of years (*c*). But though this is the rule at law, and an underlease by an executor or administrator may be supported also in equity, yet it is an exceptional mode of dealing with the assets, and those who accept such a title take it subject to the question whether it was the best way of administering them (*d*). A lease by a personal representative with an option of purchase cannot be supported (*e*), and a lease to a party having notice that a sale was required by the persons beneficially interested has been set aside (*f*).

An administrator *durante minore ætate* has, during the minority, the same powers as an ordinary administrator. The property vests in him, and he can grant leases that will be valid at any rate during the minority (*g*). And an administrator *durante absentia* also has the powers of an ordinary administrator (*h*).

An administrator *ad colligenda bona defuncti* has been appointed for (among other purposes) the acceptance of a renewal of a lease (*i*) ; and it would seem that under the modern practice power may be given to such an administrator to grant a lease where it is for the benefit of the absent or unknown next of kin (*k*).

(*a*) *Walters v. Northern Coal Mining Co.*, 1855, 5 D. M. & G. p. 641.

(*b*) *Wright v. Pitt*, 1870, 12 Eq. 408.

(*c*) *Bac. Abr.* (L. 7) 781. See *Middleton v. Dodswell*, 1806, 13 Ves. p. 268.

(*d*) *Oceanic Steam Navigation Co. v. Sutherland*, 1880, 16 C. D. 236. See per Sugden, L.C., in *Keating v. Keating*, 1835, Lloyd & G. temp. Sugden, p. 136 ; *Hackett v. Macnamara*, 1836, Lloyd & G. temp. Plunkett, 283.

(*e*) *Oceanic Steam Navigation Co. v. Sutherland*, *supra*.

(*f*) *Drohan v. Drohan*, 1809, 1 Ball & B. 185.

(*g*) *Finch's Case*, 1607, 6 Rep. 67 b ; *Re Cope*, 1880, 16 C. D. 49. *Re Thompson and M'Williams' Contract*, 1896, 1 Ir. R. 356. See 38 Geo. 3, c. 87, ss. 6, 7.

(*h*) 1 Wms. on Executors, 9th ed. p. 433.

(*i*) *In the goods of Clarkington*, 1861, 2 Sw. & Tr. 380.

(*k*) *In the goods of Schwerdtfeger*, 1876, 1 P. D. 424, where such an

An administrator cannot make a lease until letters of administration have been granted to him (*l*). Until that event the effects of the deceased do not vest in him (*m*), though the grant when made has relation back to the death of the intestate, so as to give the administrator a title to the chattels, real and personal, of the intestate from the time of his death (*n*).

An executor, on the other hand, may demise before probate (*o*); and if he dies before probate the lease will be valid (*p*) provided the will is subsequently proved (*q*).

A lease by one of several executors (*r*) or administrators (*s*) is good, personal representatives herein differing from other joint tenants, each of whom can only deal separately with his own share (*t*).

After judgment in an administration action, all powers of management vested in a trustee or personal representative are subject to the control of the Court (*u*); and the sanction of the Court should be obtained to any lease of the property in course of administration (*x*). But it has been held that a mere administration judgment, no receiver having been appointed or injunction granted to prevent the executor from dealing with the assets, will not take away his legal powers so as to invalidate the title of persons claiming under a disposition made by him in exercise of those powers (*y*).

By sect. 1 of the Land Transfer Act, 1897 (*z*), it is Real representatives.

administrator was empowered to dispose by sale of the premises and business of the deceased.

(*l*) See *Wankford v. Wankford*, 1700, 1 Salk. at p. 301.

(*m*) See 21 & 22 Vict. c. 95, s. 19.

(*n*) *Patten v. Patten*, 1833, Alcock & Napier, 493, 504. See judgment in *R. v. Horsley*, 1807, 8 East, p. 410; judgment in *Barnett v. E. of Guildford*, 1855, 11 Ex. p. 32.

(*o*) *Roe v. Summerset*, 1770, 2 W. Bl. 692, 694.

(*p*) *Wankford v. Wankford*, 1700, 1 Salk. p. 308; *Brazier v. Hudson*, 1836, 8 Sim. 67.

(*q*) See *Johnson v. Warwick*, 1856, 17 C. B. 516.

(*r*) *Doe v. Sturges*, 1816, 7 Taunt. at p. 222; *Simpson v. Gutteridge*, 1816, 1 Madd. p. 616.

(*s*) See *Jacomb v. Harwood*, 1751, 2 Ves. sen. p. 267.

(*t*) *Infra*, p. 63.

(*u*) *Webb v. E. of Shaftesbury*, 1802, 7 Ves. 480; *Bethell v. Abraham*, 1873, 17 Eq. p. 26.

(*x*) See the decree in *Webb v. E. of Shaftesbury*, *loc. cit.* p. 484, and the observation of Lord Eldon, at p. 488.

(*y*) *Berry v. Gibbons*, 1873, 8 Ch. 747, 750.

(*z*) 60 & 61 Vict. c. 65.

provided that, where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to or become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him. The section applies only in case of death after the 31st of December, 1897 (*a*). The personal representatives hold the real estate as trustees for the persons by law beneficially entitled thereto, and in due course it is to be conveyed to them: but it is subject in the first instance to administration in the same manner as if it were personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate apply to real estate, so far as the same are applicable, as if the real estate were a chattel real vesting in them (*aa*). Consequently the executors or administrators have power to let the real estate, but this power is subject to the remarks made in *Oceanic Steam Navigation v. Sutherland* (*b*) and should only be exercised under exceptional circumstances. And the lease must not contain an option of purchase (*b*). The executors can exercise their powers before probate, but upon an intestacy it is not clear in whom the legal estate is vested pending the grant of administration. Under the similar provision of sect. 30 of the Conveyancing Act, 1881, with regard to trust and mortgage estates, it was considered doubtful whether, in the absence of an administrator of a deceased sole trustee, the estate vested in the heir-at-law (*c*), though it may be that during the interval the heir-at-law stands in the place of the deceased landlord for such purposes as granting leases, distraining, and giving notice to quit (*d*). On the other hand, the intention of the Act seems to be to exclude all right of the heir as heir pending the grant of administration, and the legal estate would seem to be in abeyance (*e*).

(*a*) Sects. 1 (5), 25.

(*aa*) Sect. 2.

(*b*) 1880, 16 C. D. 236; *supra*, p. 60.

(*c*) *Re Pilling's Trusts*, 1884, 26 C. D. 432.

(*d*) See Woodfall, L. & T. 16th ed. Add. p. lxxv. Cf. Robbins, Devolution of Real Estate, p. 19.

(*e*) Tyssen, Real Representative Law, p. 19. See article in 42 Sol. Journ. 830.

VI. CO-OWNERS.

Joint tenants (*f*) are seised *per my et per tout* (*g*), that is, each of them has the entire possession as well of every parcel as of the whole (*h*); but for purposes of alienation, whether total or partial, each has an exclusive right to his own aliquot part, or undivided share (*i*). He may consequently lease his share either to another joint tenant, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear (*k*), or to a stranger (*l*). A lease by one joint tenant of his moiety, though made to commence after his death, will bind the joint tenant surviving (*m*). Where all the joint tenants join in a demise—and this is the only mode of creating an effectual lease of the whole property—the lessee holds the share of each under each separately, and also holds the whole under all. Consequently, if the tenancy is from year to year, any one of the joint tenants can give notice to quit (*n*), and upon the death of any the lessee holds the whole as tenant to the survivors who may sue for the entire rent (*p*). If one of several joint tenants grants a lease of the joint property his share only will pass to the lessee (*q*).

One tenant in common may demise his share to another, who, if he holds over as tenant on sufferance, will be liable in an action for use and occupation at the suit of the lessor (*r*); or he may lease it to a stranger, who then holds in common with the other tenant in common (*s*). A demise by all the tenants in common, though joint in its terms, operates as a separate demise by each of his own undivided

(*f*) As to lease to partners, see Wh. & T. L. C. 7th ed. 11. 961, notes to *Lake v. Gibson*.

(*g*) See *Murray v. Hall*, 7 C. B. 455, note by Manning.

(*h*) Co. Litt. 186 a; 2 Bl. Comm. 181.

(*i*) Co. Litt. 186 a.

(*k*) But upon a sale of the entire property one co-owner is not entitled to deduct arrears of rent due from the occupying co-owner as against a mortgagee of such co-owner's share, though he might require the arrears to be satisfied by the occupying co-owner before any part of the proceeds are paid to him: *Hill v. Hickin*, 1897, 2 Ch. 579.

(*l*) *Cowper v. Fletcher*, 1865, 6 B. & S. 464; Co. Litt. 186 a; Bac. Abr. (I. 5) 776; Viner's Abridg. "Distress," I. 28.

(*m*) *Whitlock v. Horton*, 1605, Cro. Jac. 91.

(*n*) *Doe v. Summersett*, 1830, 1 B. & Ad. 135. See *Jurdain v. Steere*, 1606, Cro. Jac. 83.

(*p*) *Henstead's Case*, 1594, 5 Rep. 10 a.

(*q*) *Bellingham v. Alsop*, 1605, Cro. Jac. 52; Co. Litt. 186 a. As to the authority of a partner to take a lease for partnership purposes, see *Sharp v. Milligan*, 1856, 22 Beav. 606, 609.

(*r*) *Leigh v. Dickeson*, 1885, 15 Q. B. D. 60.

(*s*) Co. Litt. 199 a.

share, and a confirmation by each of the demise of his companions' shares (*t*): and it is the same as to a joint lease by co-parceners (*u*).

But though the lease cannot be treated as a joint demise (*r*), yet it seems the tenants in common have a joint action for the rent (*x*), and if one dies the survivor may sue for the whole (*y*); or they may sever and each sue for his share (*z*). But they must join in suing on a covenant their interests in which are not divisible (*a*). Coparceners, however, constitute one heir (*b*), and one cannot claim a share of the rent separately (*bb*), or, apparently, sue separately in ejectment upon a right of re-entry for breach of covenant (*c*).

Joint tenants
for life.

Where under a settlement two or more persons are beneficially entitled to possession of settled land for life as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purpose of the S. L. A. 1882 (*d*), and they must accordingly join in exercising the statutory power of leasing (*e*).

VII. COPYHOLDERS.

Lease by
copy-
holder (*f*).

By the general custom of the realm a copyholder may make a lease for one year (*g*), but if he makes a lease for a

(*t*) *Thompson v. Hakewill*, 1865, 19 C. B. N. S. p. 726.

(*u*) *Milliner v. Robinson*, 1600, Moore, 682.

(*c*) *Burne v. Cambridge*, 1836, 1 Moo. & R. 539; *Jurdain v. Steere*, 1606, Cro. Jac. 83; *Mantle v. Wollington*, 1608, Cro. Jac. 166.

(*x*) See *Last v. Dinn*, 1858, 28 L. J. Ex. 94.

(*y*) *Wallace v. McLaren*, 1828, 1 M. & Ry. 516.

(*z*) *Martin v. Crompe*, 1699, 1 Ld. Raym. 340. See *Cutting v. Derby*, 1776, 2 W. Bl. 1077.

(*a*) *Thompson v. Hakewill*, 1865, 19 C. B. N. S. 713.

(*b*) Co. Litt. 163 b. (*bb*) *Decharms v. Horwood*, 1834, 10 Bing. 526.

(*c*) *Doe v. Lewis*, 1836, 5 A. & E. 277.

(*d*) 45 & 46 Viet. c. 38, s. 2 (*g*).

(*e*) See *supra*, p. 44. Where one undivided moiety has passed out of the settlement, see *Cooper v. Belsey*, 1899, 47 W. R. 443, overruling *Re Collinge's S. E.*, 1887, 36 C. D. 516; and see *Williams v. Jenkins*, W. N. 1894, p. 176.

(*f*) As to appropment and letting by the lord of waste lands of the manor, see Stat. of Merton (20 Hen. 3, c. 4); 13 Edw. 1, c. 46; *Northwick v. Stanway*, 1803, 3 B. & P. 346; *Luscelles v. Lord Onslow*, 1877, 2 Q. B. D. 433, 451; *Fawcett v. Strickland*, 1737, Willes, 57. A custom to grant leases of the waste of the manor without restriction is bad: *Badger v. Ford*, 1819, 3 B. & A. 153. A statutory power of leasing with the consent of three-fourths of the commoners is given by 13 Geo. 3, c. 81, s. 15.

(*g*) *Malbrick v. Luter*, 1588, 4 Rep. 26 a; *Frosel v. Welch*, 1616, Cro Jac. 403.

longer term, not warranted by the custom of the manor, and without the lord's licence, this is a forfeiture of his copyhold (*h*). The granting or refusing the licence is a matter wholly in the lord's discretion (*i*), and if he is only tenant for life, it seems that the licence, unless granted under a statutory or other power, will not support a lease after his death (*k*).

By the custom of probably most manors a licence to a copyholder to lease runs with the land, so as to enable a lease in pursuance of it to be made by his surrenderee, or after his death by his heir or devisee (*l*).

The restriction cannot be evaded by the grant of a succession of leases, each just within the period allowed by the custom (*m*); and a lease under a licence must be in the terms of the licence (*n*), or at any rate must have the same legal effect as if it were in such terms (*o*); but it may be for a period shorter than that permitted by the licence (*p*). A lease within the authorized period, with a covenant for renewal beyond the period, leaves the lessee to his remedy on the covenant, and does not pass such an estate as to cause a forfeiture (*q*); and an agreement for a lease subject to the lord's licence being obtained, under which the lessee has entered, binds him to the performance of the covenants stipulated for (*r*).

The lease granted in pursuance of the licence is a common law and not a copyhold interest. Hence it is customary to register building leases of copyhold lands in Middlesex (*s*). The lessee under a lease pursuant to a

(*h*) *Kensy v. Richardson*, 1599, Cro. Eliz. 728; *Jackman v. Hoddesdon*, 1595, *ib.* 351.

(*i*) *Reg. v. Hale*, 1838, 9 A. & E. p. 341.

(*k*) *Petty v. Evans*, 1610, Brownlow & G., Part II., 40. As to the powers of limited owners of manors to grant licences to lease under the Settled Land Acts and the Settled Estates Act, 1877, see *supra*, p. 48.

(*l*) *Whitton v. Peacock*, 1834, 3 My. & K. at p. 335. See Scriven on Copyholds, 7th ed. 227.

(*m*) *Lutterel v. Weston*, 1613, Cro. Jac. 308; *Mathews v. Whetton*, 1629, Cro. Car. 233.

(*n*) *Jackson v. Neal*, 1594, Cro. Eliz. 395.

(*o*) *Haddon v. Arrowsmith*, 1596, 1 Cro. Eliz. 461; *Worledge v. Benbury*, 1618, Cro. Jac. 436.

(*p*) *Goodwin v. Longhurst*, 1597, Cro. Eliz. 535.

(*q*) *Fenny v. Child*, 1814, 2 M. & S. 255; *Lady Montague's Case*, 1613, Cro. Jac. 301. See *Rawstorne v. Bentley*, 1793, 4 Bro. C. C. 415.

(*r*) *Pistor v. Cater*, 1842, 9 M. & W. 315. Cf. *Doe v. Clare*, 1788, 2 T. R. 739.

(*s*) See Rigge on Registration, 87, note (*m*); Scriven on Copyholds, 7th ed. p. 227; Elton on Copyholds, 2nd ed. p. 94.

licence may assign or underlet without obtaining a new licence from the lord (*t*). The lease under the licence is not affected by a forfeiture by the copyholder (*u*).

Lease not
under licence.

A lease not authorized by custom or licence is good against everybody save the lord (*r*), and even as between the parties to the lease and the lord, the unauthorized demise is only a ground of forfeiture which the lord may waive (*x*). Moreover, if the lord at the time of the lease is tenant for life, and dies before he has seized for the forfeiture, the remainderman cannot take advantage of it (*y*). A lease to commence *in futuro* is a cause of forfeiture *in presenti*, since it is a good lease between the parties (*z*).

VIII. MORTGAGOR AND MORTGAGEE.

Leases by
mortgagor, or
mortgagee in
possession.
Convey-
ancing Act,
1881, s. 18.

Under sect. 18 of the Conveyancing Act, 1881 (*a*), a mortgagor of land (*b*), while in possession, has power, as against every incumbrancer, and a mortgagee of land, while in possession, has power, as against all prior incumbrancers, if any, and as against the mortgagor, to make (i.) an agricultural or occupation lease for any term not exceeding twenty-one years, and (ii.) a building lease for any term not exceeding ninety-nine years; subject to the requirements of the section (*c*).

Agreements.

Sub-sect. (12).

Sub-sect. (17).

A contract to make or accept a lease under the section may be enforced by or against every person on whom the lease, if granted, would be binding; and the provisions of the section apply, so far as circumstances admit, to any

(*t*) *Johnson v. Smart*, 1615, 1 Roll. Abr. 508, pl. 14.

(*u*) *Clarke v. Arden*, 1855, 16 C. B. 227.

(*v*) Bac. Abr. (I. 6) 776; *Goodwin v. Longhurst*, 1597, Cro. Eliz. 535; *Doe v. Tresidder*, 1841, 1 Q. B. 416. (*x*) *Doe v. Bousfield*, 1844, 6 Q. B. 492.

(*y*) *Lady Montague's Case*, 1613, Cro Jac. 301.. See *Doe v. Bousfield*, 1844, 6 Q. B. p. 493; *Scriven on Copyholds*, 7th ed. 221. According to *Eastcourt v. Weeks*, 1698, 1 Salk. 186, the forfeiture cannot be taken advantage of by the heir.

(*z*) *East v. Harding*, 1597, Cro. Eliz. 498. (*a*) 44 & 45 Vict. c. 41.

(*b*) See *infra*, p. 511, for the provisions of the Tenants Compensation Act, 1890, with reference to tenancies of mortgaged holdings subject to the Agricultural Holdings Act, 1883, and the Allotments, &c., Compensation for Crops Act, 1887.

(*c*) As to reserving the best rent, see *Renner v. Tolley*, 1893, 68 L. T. 815; as to building leases, see sub-sect. (9). The section does not interfere with any express power of leasing contained in the mortgage deed, sub-sect. (14); and as to the effect of the statutory power, see sub-sect. (15).

letting, and to an agreement, whether in writing or not, for leasing or letting. Thus, where a parol lease would be valid, it can be made under the section, notwithstanding that some of the requirements cannot be complied with (*cc*).

The above powers apply: (1) If the mortgage is made after 1st January, 1882, and a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing; or (2) if by agreement in writing, made after 1st January, 1882, between mortgagor and mortgagee, the provisions of sect. 18 of the Conveyancing Act, 1881, have been applied to a mortgage made before 1st January, 1882. But such agreement is not to prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

Application of sect. 18. Sub-sects. (13), (16).

A lease made under the Act by a mortgagor in possession takes effect as though the mortgagee had joined in granting it, and any other property comprised in the mortgage is subject to the rights conferred by the lease in favour of the demised land (*d*). The mortgagee, on giving notice to the lessee and going into possession, is entitled by virtue of the Act to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and such rights cannot be affected by any collateral agreement between the lessor and lessee (*e*). This is upon the ground that the mortgagee has "the reversionary estate" to which the rent and the benefit of the covenants and conditions are made incident by sect. 10 of the Conveyancing Act, 1881 (*f*).

Effect of lease under statutory power.

With respect to leases made otherwise than under the statute, or in exercise of a power contained in the mortgage deed (*g*), the following rules hold good:—

Leases not in pursuance of the statute.

(a) *Leases by Mortgagor.*

Leases made before the mortgage are binding on the mortgagee (*h*).

i. Leases before mortgage.

(*cc*) Wolstenholme, B. & C. on The Conv. Acts, 7th ed., p. 65.

(*d*) *Wilson v. Queen's Club*, 1891, 3 Ch. 522.

(*e*) *Municipal Building Society v. Smith*, 1888, 22 Q. B. D. 70.

(*f*) *Infra*, p. 416.

(*g*) Under such a power the mortgagor may grant a lease to a trustee for himself: *Bevan v. Hubgood*, 1860, 1 J. & H. 222.

(*h*) *Moss v. Gallimore*, 1779, 1 Doug. 279; 1 Sm. L. C. 10th ed. 497. See *Rogers v. Humphreys*, 1835, 4 A. & E. 299.

ii. Leases
after
mortgage.

A lease made after the mortgage by a mortgagor in possession is good by way of estoppel between the parties to it (*i*), so that the lessor may recover the rent, and conversely is liable on his covenant for quiet enjoyment (*k*). But it is void as against the mortgagee, who may eject the lessee without any previous notice (*l*), subject, however, to the right of the lessee, if he so chooses, to redeem the mortgage (*m*).

Tenancy
under mort-
gagee.

In order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement (*n*). The mortgagee cannot, by merely giving the lessee notice of the mortgage, make the lessee his tenant (*n*); and the notice, though followed by continued occupation by the lessee, is not evidence of an agreement for a tenancy (*o*). But payment of rent by the lessee to the mortgagee may create a tenancy from year to year, so as to entitle the lessee to notice (*p*); and so, too, where the mortgagee demands the rent from the lessee for payment of his interest (*q*), or encourages him to lay out money in improvements (*r*), he cannot, after thus recognizing the lawfulness of the lessee's occupation, treat him as a trespasser and eject him without notice (*s*). And where a tenancy is created under the mortgagee, this is an entirely new tenancy—a tenancy by attornment, for instance, does not relate back to the

(*i*) See *infra*, p. 74; *Doe v. Thompson*, 1847, 9 Q. B. 1037; *Cuthbertson v. Irving*, 1860, 6 H. & N. 135.

(*k*) *Hartcup v. Bell*, 1883, C. & E. 19.

(*l*) *Keech v. Hall*, 1778, 1 Doug. 21; *Thunder v. Belcher*, 1803, 3 East, 449. See per Littledale, J., in *Pope v. Biggs*, 1829, 9 B. & C. p. 253, and per Lord Selborne in *Lows v. Telford*, 1876, 1 App. Cas. p. 425.

(*m*) *Turn v. Turner*, 1888, 39 Ch. D. 456.

(*n*) 1 Sm. L. C. 10th ed. 505; *Evans v. Elliott*, 1838, 9 A. & E. 342.

(*o*) *Towerson v. Jackson*, 1891, 2 Q. B. 484; overruling *Brown v. Storey*, 1840, 1 M. & Gr. 117, and (on this point) *Underhay v. Read*, 1887, 20 Q. B. D. 209.

(*p*) *Doe v. Ongley*, 1850, 10 C. B. 25. Cf. *Wheeler v. Branscombe*, 1843, 5 Q. B. 373.

(*q*) *Doe v. Hales*, 1831, 7 Bing. 322. Cf. *Doe v. Cadwallader*, 1831, 2 B. & Ad. 473.

(*r*) Per Parke, B., in *Doe v. Hughes*, 1847, 11 Jur. 698.

(*s*) As to an assignee from the mortgagee, see *Smith v. Eggington*, 1874, L. R. 9 C. P. 145.

notice of the mortgage (*t*)—and a tenancy from year to year arising upon payment of rent does not necessarily import the terms of the mortgagor's lease. Whether it does so or not is a question of fact (*u*). Practically the new tenancy under the mortgagee puts an end to the old tenancy under the mortgagor (*x*), on the ground that the entry of the mortgagee is a constructive eviction of the tenant by title paramount, and so the estoppel is terminated (*y*); and even if constructive eviction is not sufficient for this purpose (*z*), the lessee, if he pays rent to the mortgagee under threat of legal proceedings, can treat the payment as made on account of the mortgagor and so resist the demand of the latter (*a*).

(b) *Leases by Mortgagee in Possession.*

A lease granted by a mortgagee in possession, without the concurrence of the mortgagor, cannot after redemption stand good as against the mortgagor (*b*), save, possibly, a lease made to avoid an apparent loss and merely in necessity (*c*). If the mortgagee grants a lease and puts the lessee in possession, the mortgagor may file a bill to redeem, and ask for an account against the mortgagee, as in a case of wilful default, and thereby raise the question whether the rent reserved was the best that could have been obtained (*b*). Independently, therefore, of the statutory power or of a conventional power of leasing, both mortgagor and mortgagee should concur in leasing the mortgaged property, and in that case the instrument will operate as the demise of the mortgagee and the confirmation of the mortgagor (*d*). The lessee's covenants should be with the

Leases by mortgagee in possession.

(*t*) *Evans v. Elliott*, 1838, 9 A. & E. 342. Cf. *Gladman v. Plumer*, 1845, 15 L. J. Q. B. 79.

(*u*) *Oakley v. Monck*, 1866, L. R. 1 Ex. 159.

(*c*) See *Corbett v. Plowden*, 1884, 25 C. D. 678.

(*y*) *Mayor of Poole v. Whitt*, 1846, 15 M. & W. 571.

(*z*) *Delaney v. Fox*, 1857, 2 C. B. N. S. 768; *Carpenter v. Parker*, 1857, 3 *ib.* 206.

(*a*) *Johnson v. Jones*, 1839, 9 A. & E. 809; *Underhay v. Read*, 1887, 20 Q. B. D. 209.

(*b*) See per Lord Romilly, M.R., in *Franklin v. Ball*, 1864, 34 L. J. Ch. at p. 154; *S. C.*, 33 Beav. 560.

(*c*) *Hungerford v. Clay*, 1722, 9 Mod. 1.

(*d*) *Doe v. Adams*, 1832, 2 Cr. & J. 232; 2 Tyr. 289; *Smith v. Porkington*, 1831, 1 Cr. & J. 445.

mortgagee (*e*) ; the covenant for quiet enjoyment should be by him ; and the proviso for re-entry should empower him to re-enter (*f*).

Mortgagor
tenant for
life.

A tenant for life of settled land who has mortgaged his life interest can, unless the mortgagee is actually in possession of the settled land or part thereof, exercise his power of leasing under the S. L. A. 1882 (*g*), provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with the Act. If the mortgagee is in possession, the tenant for life retains his power of leasing under the S. L. A., but it cannot be exercised without the consent of the mortgagee (*h*). Where a mortgagor tenant for life applies to the Court for an order under sect. 10 of the S. L. A. 1890 (*i*) authorizing a lease of the mansion house, &c., the Court must be satisfied that the mortgagee consents (*k*).

IX. JUDGMENT CREDITORS.

Judgment
creditor.

A judgment creditor is entitled to be put in possession of the whole of the debtor's freehold and copyhold lands, and he then becomes tenant by *elegit* ; but for the land to be bound by the judgment, not only must there be actual delivery in execution (*l*), but the writ must also be registered under the Land Charges Registration and Searches Act, 1888 (*m*). The estate of the tenant by *elegit* is liable to be determined at any time by payment of the debt (*n*), and a lease granted by him is of the same precarious nature (*o*).

X. AGENTS.

Agents.

An agent (*oo*) to execute a lease by deed must be appointed by deed (*p*), but if the lease to be made by the

(*e*) See *Webb v. Russell*, 1789, 3 T. R. 393.

(*f*) *Saunders v. Merryweather*, 1865, 3 H. & C. 902.

(*g*) 45 & 46 Vict. c. 38 ; *supra*, p. 44. See sect. 50 (3).

(*h*) S. L. A. 1882, s. 50 (3). As to leases where the tenant for life is bankrupt, see *Re Mansell's S. E.*, W. N. 1884, p. 209.

(*i*) 53 & 54 Vict. c. 69. (*k*) *Re Schright's S. E.*, 1886, 33 C. D. 429.

(*l*) 27 & 28 Vict. c. 112. (*m*) 51 & 52 Vict. c. 51.

(*n*) *Price v. Farney*, 1825, 3 B. & C. 733.

(*o*) 1 Platt on Leases, 722. But see *Doughty v. Stiles*, 1673, Rep. t. Finch, 115. (*oo*) See *Hamilton v. Clavricarde*, 1762, 1 Bro. P. C. 341.

(*p*) *Steiglitz v. Egginton*, 1815, Holt, N. P. 141 ; *Horsley v. Rush*, 1788, cited 7 T. R. p. 209 ; *Berkeley v. Hardy*, 1826, 5 B. & C. 355.

agent is not under seal, he need not be authorized in writing (*q*).

The fact of a landlord employing a steward or a land agent (*r*) to manage his property does not necessarily confer on the steward or land agent power to enter into contracts for granting leases of farms for terms of years (*s*); but a power to a land agent to "manage and superintend estates" authorizes him on behalf of his principal to enter into an agreement for a usual and customary lease according to the nature and locality of the property (*t*). A farm bailiff accustomed to let from year to year upon certain ordinary terms, and to receive rents, has no implied authority to let upon unusual terms unknown to the owner (*u*). But the owner, either expressly in writing (*r*) or by acts indicating his assent, may ratify his steward or bailiff's contract (*x*).

Land agents,
&c.

A mere authority to an agent to procure a tenant for premises at a specified rent, without any instructions as to the provisions to be inserted in the lease or agreement, does not give the agent implied authority to conclude a contract for letting the premises. His duty is to find a tenant and communicate his offer to the principal (*y*). Under such circumstances the agent has no implied authority to let a person into possession of the premises (*z*).

Authority of
agent.

A house agent (*a*), employed to find a tenant for a house, and receiving a commission (*b*), must exercise reasonable

Duty of agent.

(*q*) *Coles v. Trecothick*, 1804, 9 Ves. p. 250; *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 22, 31; *Heard v. Pilley*, 1869, 4 Ch. 548.

(*r*) *Mortal v. Lyons*, 1858, 8 Ir. Ch. R. 112, 117.

(*s*) *Collen v. Gardner*, 1856, 21 Beav. 540; *Ridgway v. Wharton*, 1854, 3 D. M. & G. 677, 688.

(*t*) *Peers v. Sneyd*, 1853, 17 Beav. 157. And he may, in the absence of any limitation on his powers, authorize the tenant to change agricultural land to market gardens: *Re Pearson & PAnson*, 1899, 69 L. J. Q. B. 878.

(*u*) *Turner v. Hutchinson*, 1860, 2 F. & F. 185.

(*v*) *Fitzmaurice v. Bayley*, 1860, 6 E. & B. 868; 8 *Ibid.* 664; 9 H. L. C. 78.

(*c*) See *Rodmel v. Eden*, 1859, 1 F. & F. 542; *Powell v. Smith*, 1872, 14 Eq. 85 (in this case the owner had let the tenant into possession of a farm under an agreement for a lease entered into by the agent).

(*y*) *Wilde v. Watson*, 1878, 1 L. R. Ir. 402, 405. See *Hamer v. Sharp*, 1874, 19 Eq. 108. (*z*) See *Slack v. Crewe*, 1860, 2 F. & F. 59.

(*a*) Every person who exercises the business of a house agent must take out a yearly licence of 2l. (24 & 25 Vict. c. 21). See the definition of house agent in sect. 10.

(*b*) As to the circumstances under which a house agent may claim a commission payable on a letting "through his intervention," see *Mansell v. Clements*, 1874, L. R. 9 C. P. 139. An agent earns his commission if he is employed to lease and gives an introduction which

care and diligence in ascertaining the condition of a person before he introduces him to the landlord as a tenant (*c*); for when the owner of a house proposes to a house agent that he should find a tenant for him, it is meant that he should find a fit and proper tenant (*c*).

Execution by agent.

The agent should sign any lease or agreement in the name of the principal—"A. B. by C. D. his agent" (*d*), or "as agent and on behalf of A. B." (*e*). No particular form of words is required to be used, provided the act be done in the name of the principal—*e.g.* it will suffice if opposite to the seal be written the words "for A. B. [principal], C. D. [agent]" (*f*). But the donee of a power of attorney may execute any instrument in his own name and with his own seal (*g*).

Liability of agent.

If the agent signs the lease or agreement in his own name he will *prima facie* be deemed to contract personally; and in order to discharge him from this liability it must appear from the lease or agreement that he did not intend to bind himself as principal (*h*). If in the body of the lease or agreement it appears that the agent was to be responsible for the fulfilment of the contract, the fact that he expressly makes it "for and on behalf of" or "as agent for" another will not discharge him from personal liability (*i*).

XI. RECEIVERS, &C.

Receivers.

Under the old practice a receiver appointed by the Court had no power of letting even for a single year (*k*) without obtaining the sanction of the Court (*l*). Under the present

results in a lease, although he does not carry through the whole adjusting of the terms: *Toulmin v. Millar*, 1887, 58 L. T. 96. See *Curtis v. Nixon*, 1871, 24 L. T. 706; *Lofts v. Bourke*, 1884, 1 T. L. R. 58; *Debenham v. Chambers*, 1895, 12 T. L. R. 24; *Rimmer v. Knowles*, 1874, 22 W. R. 574.

(*c*) *Heys v. Tindall*, 1861, 1 B. & S. 296, 298.

(*d*) *Combe's Case*, 1614, 9 Rep. p. 76 b; *White v. Cuyler*, 1795, 6 T. R. 176.

(*e*) *Green v. Kopke*, 1856, 18 C. B. 549.

(*f*) *Wilks v. Back*, 1802, 2 East, p. 145.

(*g*) Conveyancing Act, 1881, s. 46. See *Lawrie v. Lees*, 1881, 7 App. Cas. 19.

(*h*) *Notes to Thomson v. Davenport*, 1829, 9 B. & C. 78; 2 Sm. L. C. 10th ed. p. 388.

(*i*) *Norton v. Herron*, 1825, 1 C. & P. 648; *Tanner v. Christian*, 1855, 4 E. & B. 591. As to the liability of a person who contracts as agent without authority, see *Collen v. Wright*, 1857, 8 E. & B. 647.

(*k*) *Wynne v. Lord Newborough*, 1790, 1 Ves. 164.

(*l*) *Morris v. Elme*, 1790, 1 Ves. 139. As to the liability of a receiver for rent, see *Justice v. James*, 1899, 15 T. L. R. 181.

practice he may let at his discretion for a year certain or less, or for any time not exceeding three years, without applying for the sanction of the Judge (*m*); and since in any case he can only grant such parol lease as can be granted under sect. 2 of the Statute of Frauds (*n*), the same limit applies even when he obtains the sanction of the Court. He has no power to transfer the legal estate, nor can such power be given him by the Judge (*o*), and if the Court sanctions a longer lease steps must be taken to procure its execution by the legal owner; but a lease by the receiver is good by estoppel as between himself and the lessee (*p*).

The Bankruptcy Act, 1883 (*q*), and the Companies Acts, 1862 to 1898 (*r*), do not specifically confer upon trustees in bankruptcy or liquidators a power of leasing, such power being in general unnecessary for the winding up of the estate, but a lease can be made with the sanction of the Court (*s*).

Trustees in
bankruptcy
and
liquidators.

(3) RESTRICTIONS ARISING FROM CONFIDENTIAL RELATIONS.

There are certain classes of persons, standing in confidential relations to the owners of property, who possess peculiar opportunities of obtaining a knowledge of the value of the property with which they are concerned, and peculiar means of influencing the minds of the persons for whom they act. Courts of Equity look with a jealous eye on the transactions of individuals occupying this position, and leases granted by principals to agents (*ss*), by clients to attorneys, by wards to guardians, by *cestui que trusts* to trustees, or by mortgagors to mortgagees (*t*), will be set aside if the considerations given for the leases are grossly

(*m*) Seton on Decrees, 5th ed. I. 675. (*n*) 29 Car. 2, c. 2; *infra*, p. 118.

(*o*) Kerr on Receivers, 3rd ed. 167; *Gibbins v. Howell*, 1818, 3 Madd. 469; *Evans v. Matthias*, 1857, 7 E. & B. 590, see p. 601.

(*p*) *Evans v. Matthias*. See *infra*, p. 74. (*q*) See sects. 44, 54, 56.

(*r*) See Act of 1862, ss. 95, 133; Comp. (Winding-up) Act, 1890, s. 12.

(*s*) See Palmer's Comp. Prec., Part II., 7th ed. p. 317. Since the property of the company does not vest in the liquidator, the lease should be in the name, and under the seal of the company; *ibid.*, p. 653.

(*ss*) *Moloney v. Kernan*, 1842, 2 Dr. & War. 31.

(*t*) *Webb v. Rorke*, 1806, 2 Sch. & Lef. 661; *Hickes v. Cooke*, 1816, 4 Dow, 16. The doctrine as regards mortgagors depended to some extent on the usury laws; but also on the circumstance that the lease incumbered the equity of redemption (per Lord Redesdale in *Hickes v. Cooke*, *loc. cit.*, p. 26). At the present time it must be received with caution.

inadequate (*u*), or if any advantage appears to have been taken of the confidential relation in which the parties stand (*x*).

Renewals to
trustees.

If a trustee takes a renewal of a lease in his own name, this, so far as it is beneficial, operates in favour of the *cestui que trust*, even though the lessor refused to renew for his benefit (*y*); and where a trustee of a bankrupt takes a lease to himself, he is answerable for profit and must bear any loss (*z*). So, again, if a person, jointly interested with an infant in a lease, obtains a renewal to himself only, and the lease proves beneficial, he will be held to have acted as trustee, and the infant may claim his share of the benefit; but if the lease does not prove beneficial, the lessee must take it upon himself (*a*).

Leases by
intoxicated
persons.

Leases made by persons in a state of intoxication, when they have been drawn into intoxication by contrivance, or any unfair advantage has been taken of their situation, will be set aside (*b*). In general the contract of a man so intoxicated as to be deprived of his reason is not void but voidable, and it can be confirmed when he becomes sober (*c*).

Duress.

A lease made under duress is void (*d*).

(4) LEASES BY ESTOPPEL.

Leases by
estoppel.

When a person who has no estate in the land purports to grant a lease thereof, and the lessee enters, the relation of landlord and tenant is created, and as between the parties the lease is treated as a valid subsisting lease. This is upon the principle of estoppel, the lessor and the lessee being reciprocally estopped from disputing the title of the lessor to grant the lease.

The estoppel seems to have been first recognized in the

(*u*) *Ward v. Hartpole*, 1776, 3 Bligh, 470; *Dawson v. Massey*, 1809, 1 Ball. & B. 219.

(*x*) *Aylward v. Kearney*, 1814, 2 Ball. & B. 463. See the notes to *Huguenin v. Baschey*, 1807, 1 Wh. & T. L. C. 7th ed. 247; and *cf. Grosvenor v. Skerratt*, 1860, 28 Beav. 659.

(*y*) *Ex parte James*, 1803, 8 Ves. p. 345.

(*z*) *Ex parte Hughes*, 1802, 6 Ves. 617.

(*a*) *Ex parte Grace*, 1799, 1 B. & P. 376.

(*b*) *Cooke v. Clayworth*, 1811, 18 Ves. 12; *Say v. Barrick*, 1812, 1 V. & B. 195. See *Butler v. Mulvihill*, 1819, 1 Bligh, 137, note at p. 160.

(*c*) *Mattheus v. Baxter*, 1873, L. R. 8 Ex. 132; *Cooke v. Clayworth*, *supra*. See *Pitt v. Smith*, 1811, 3 Camp. 33.

(*d*) Bac. Abr. "Duress" (C.) 774.

case of a lease by indenture (*e*), and was simply a case of estoppel by deed. It had the consequence that if the lessor subsequently acquired the legal estate in the land, the estate of the lessee by estoppel became an estate in interest. The estate of the lessor was said to feed the estoppel, and the lease was deemed to be well granted out of the legal estate (*f*). Previous to such acquisition of estate by the lessor, he has a reversion by estoppel, which *primâ facie* is a reversion in fee (*g*).

But the principle is not confined to leases by indenture. A tenant, whatever be the nature of his tenancy (*h*), cannot, while he retains possession, dispute his landlord's title (*i*), or put in any plea which brings it into question (*k*), even though the defect in the title appears on the face of the lease (*l*), or though the tenant is prepared to show that the landlord obtained control of the land by fraud (*m*). This rule has been referred to as "the common law principle that one who derives possession of land under another shall not be permitted to question his right to give him possession" (*n*), and it extends to all cases where possession has been obtained by permission, as by a licensee, a lodger, or a servant (*o*). Where possession has been received from an agent for an undisclosed principal, the estoppel applies in favour of the principal (*p*). And since estoppels are in their nature mutual (*q*), the landlord is equally estopped from denying

Estoppel by
tenancy.

(*e*) Bac. Abr. (O.) 850; Co. Litt. 47 b; *Smith v. Low*, 1739, 1 Atk. 489.

(*f*) *Doe v. Oliver*, 1830, 2 Sm. L. C. 10th ed. 706; *Webb v. Austin*, 1844, 7 M. & Gr. 701.

(*g*) *Sturgeon v. Wingfield*, 1846, 15 M. & W. 224; *Cuthbertson v. Irving*, 1860, 6 H. & N. 135.

(*h*) See per Cresswell, J., in *Doe v. Foster*, 1846, 3 C. B. p. 229.

(*i*) *Doe v. Smythe*, 1815, 4 M. & S. 347; *Att.-Gen. v. Hotham*, 1823, T. & R. p. 219; *Doe v. Fuller*, 1835, Tyr. & G. 17; *Phipps v. Sculthorpe*, 1817, 1 B. & A. 50; *Agar v. Young*, 1841, Car. & M. 78; *Cook v. Whellock*, 1890, 24 Q. B. D. 658. See notes to *Feale v. Warner*, 1 Wms. Saund. 580, and to *Walton v. Waterhouse*, 2 Wms. Saund. 826.

(*k*) *Palmer v. Ekins*, 1725, 2 Ld. Raym. 1550.

(*l*) *Duke v. Ashby*, 1862, 7 H. & N. 600; *Jolly v. Arbutnot*, 1859, 4 De G. & J. 224; *Morton v. Woods*, 1869, L. R. 4 Q. B. 293. Apparently *Pargeter v. Harris*, 1845, 7 Q. B. 708, so far as it decided the contrary, is overruled.

(*m*) *Parry v. House*, 1817, Holt, N. P. 489.

(*n*) Per Cockburn, C.J., in *Delaney v. Fox*, 1857, 2 C. B. N. S. p. 774.

(*o*) See per Patteson, J., in *Doe v. Baytop*, 1835, 3 A. & E. p. 192.

(*p*) *Fleming v. Gooding*, 1834, 10 Bing. 549.

(*q*) Co. Litt. 352 a.

to the tenant any rights incident to the tenancy which he has purported to create (*r*). From the same principle of the mutuality of estoppels it follows that, if the lessor is by reason of disability—*e.g.* infancy—not liable to be estopped, so neither is the lessee (*s*).

The estoppel prevails in all actions, and as between assigns of original parties.

The estoppel is not confined to ejectment, but can be set up in all actions between the parties arising upon the tenancy, as in an action for rent (*t*), on a covenant in the lease (*u*), or in trespass (*x*); nor can the tenant obtain even equitable relief upon an allegation which brings the landlord's title into dispute (*y*). It holds in favour of persons deriving title under the lessor (*z*), and, in general, upon a lease by a tenant for life, the estoppel can be set up by the remainderman, for the title is the same (*a*). So, too, the estoppel binds persons claiming under the lessee (*b*), including under-tenants (*c*), or in any way obtaining possession by consent of the lessee, as where a person setting up an adverse title pays the lessee money to get into possession (*d*); save under special circumstances, as where the lessor's title is derived under the person so getting into possession (*e*). An estoppel binding a partnership is binding on each partner (*f*). But the estoppel does not bind a third person, not claiming possession of the land under the tenant. Hence such third person, who has brought his goods on the land by the tenant's licence, can dispute the landlord's title to distrain (*g*).

Duration of estoppel.

The estoppel is said to last only during the continuance

(*r*) *Cf. Weller v. Spiers*, 1872, 20 W. R. 772.

(*s*) Bac. Abr. (O.) 852; *Smith v. Low*, 1739, 1 Atk. 489.

(*t*) *Parker v. Manning*, 1798, 7 T. R. 537. As to replevin, see *Sullivan v. Stradling*, 1764, 2 Wils. 208.

(*u*) *Cuthbertson v. Irving*, 1860, 6 H. & N. 135.

(*x*) *Delaney v. Fox*, 1857, 2 C. B. N. S. 768.

(*y*) *Homau v. Moore*, 1817, 4 Price, 5.

(*z*) *Trevivan v. Laurence*, 1705, 1 Salk. 276; *Palmer v. Elkins*, 1725, 2 Ld. Raym. 1550; *Parker v. Manning*, *supra*; *Cuthbertson v. Irving*, *supra*; *Ward v. Ryan*, 1875, 1r. R. 10 C. L. 17.

(*a*) *Doe v. Whitroe*, 1822, Dowl. & Ry. N. P. 1. *Cf. Doe v. Langdon*, 1848, 12 Q. B. 711.

(*b*) *Doe v. Smythe*, 1815, 4 M. & S. 347; *Taylor v. Needham*, 1813, 2 Taunt. 278.

(*c*) *L. & N. W. Ry. Co. v. West*, 1867, L. R. 2 C. P. 553; *Doe v. Beckett*, 1843, 4 Q. B. p. 606; *Barwick v. Thompson*, 1798, 7 T. R. 488.

(*d*) *Doe v. Mills*, 1834, 2 A. & E. 17.

(*e*) *Ford v. Ager*, 1863, 2 H. & C. 279.

(*f*) *Francis v. Doe*, 1838, 4 M. & W. 331.

(*g*) *Tadman v. Henman* 1893 2 Q. B. 168.

of the lease, "for by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines" (*h*). But clearly the lessee is estopped until he has given up possession (*i*), unless, apparently, he is himself entitled and took the lease under a mistake (*k*).

But there is no estoppel where an interest, which has since determined, passed by the lease, and consequently, if the lessor had an estate, but an insufficient one, he is not estopped from avoiding the lease when that estate comes to an end. Thus if tenant *pur autre vie* leases for years and purchases the reversion, and the life falls during the lease, he is not bound to make good the lease out of the reversion; and so if one who has a lease for ten years grants a lease for twenty years (*l*). In the latter case, indeed, the lease operates as an assignment and the relation of landlord and tenant is not created (*m*).

No estoppel where interest passes.

In the same manner (*n*) the lessee, though he is estopped from alleging that the lessor had no title at all at the date of the lease, is at liberty to show that a title which he then had has since expired (*o*). But where a lessor was only entitled as coparcener to a share in the demised land, it was held that, notwithstanding this rule, the lessee was estopped as against the heir from denying his title to the whole (*p*). Where a new tenancy is created without any fresh letting into possession, the new tenancy creates no absolute estoppel as to the then title of the lessor, and, upon the principle to be mentioned presently (*q*), the tenant may

Tenant may show landlord's title has expired.

(*h*) Co. Litt. 47 b; *James v. Landon*, 1582, Cro. Eliz. 36.

(*i*) *Doe v. Austin*, 1832, 2 Moo. & Sc. 107; 9 Bing. 41.

(*k*) Per Blackburn, J., in *Ulark v. Adie*, 1877, 2 App. Cas. p. 435; *Eliot v. Mayor of Bristol*, 1895, 71 L. T. 659; *Accidental Death Insurance Co. v. Mackenzie*, 1861, 5 L. T. 20.

(*l*) Co. Litt. 47 b; Bac. Abr. (O.) 853; *Treport's Case*, 1594, 6 Rep. 14 b. See per Parke, B., in *Doe v. Seaton*, 1835, 2 Cr. M. & R. p. 730.

(*m*) *Langford v. Selmes*, 1857, 3 K. & J. 220.

(*n*) *Blake v. Foster*, 1800, 8 T. R. 487; *Hill v. Saunders*, 1825, 1 B. & C. 529; *Doe v. Seaton*, 1835, 2 Cr. M. & R. 728.

(*o*) *Brudnell v. Roberts*, 1762, 2 Wils. 143; *England v. Slade*, 1792, 4 T. R. 682; *Doe v. Watson*, 1817, 2 Stark. 230; *Neave v. Moss*, 1823, 1 Bing. 360; *Doe v. Ramsbotham*, 1815, 3 M. & S. 516; *Hopcraft v. Keys*, 1833, 9 Bing. 613; *Pope v. Biggs*, 1829, 9 B. & C. p. 251; *Doe v. Edwards*, 1834, 5 B. & Ad. 1065; *Mountnoy v. Collier*, 1853, 1 E. & B. 630. Cf. *Weld v. Baxter*, 1856, 11 Ex. 816. See *Knight v. Hickman* 1885, 29 Sol. Journ. 386 (Salisbury County Court).

(*p*) *Weeks v. Birch*, 1893, 69 L. T. 759.

(*q*) *Infra*, p. 78.

show that he took the fresh tenancy under a mistake as to the landlord's title (*r*).

Estoppel by
payment of
rent, &c.

Where a person in possession of land recognizes a subsisting tenancy under another, whether by payment of rent, by submission to distress (*s*), or otherwise, he is similarly estopped from disputing the title of that other, although he did not originally receive possession from him (*t*); and if the recognition has taken place upon a change of landlords at the request of the former landlord (*u*), such former landlord is estopped from alleging the tenancy under himself to be subsisting (*x*).

Exceptions.

But the rule of estoppel in favour of a landlord from whom the tenant did not originally receive possession is not absolute; the tenant may dispute the landlord's title if he can show that he was induced to pay rent by fraud or misrepresentation (*y*); and he may give evidence that the person to whom rent was paid received it as agent for a third person (*z*). Moreover, provided he can show that another person is entitled to receive the rent (*a*), he is permitted to show that the person whom he has recognized as landlord is not really entitled and that the recognition took place under mistake (*b*). And, upon the principle already mentioned, the tenant may show that the title of the person whom he has recognized as landlord has since such recognition come to an end (*c*).

(*r*) *Claridge v. Mackenzie*, 1842, 4 M. & Gr. 143.

(*s*) *Panton v. Jones*, 1813, 3 Camp. 372; *Cooper v. Blandy*, 1834, 1 Bing. N. C. 45. See *Jump v. Payne*, 1899, 68 L. J. Q. B. 607.

(*t*) See *Cooke v. Loxley*, 1792, 5 T. R. 4.

(*u*) See *Hall v. Butler*, 1839, 10 A. & E. 204.

(*x*) *Downs v. Cooper*, 1841, 2 Q. B. 256.

(*y*) *Doe v. Wiggins*, 1843, 4 Q. B. 367; *Williams v. Bartholomew*, 1798, 1 B. & P. 326; *Doe v. Brown*, 1837, 7 A. & E. 447; *Carlton v. Bowcock*, 1884, 59 L. T. 659.

(*z*) *Jones v. Stone*, 1894, A. C. 122.
(*a*) *Cooper v. Blandy*, 1834, 1 Bing. N. C. 645; *Knight v. Cox*, 1856, 18 C. B. 645.

(*b*) *Rogers v. Pitcher*, 1815, 6 Taunt. 202; *Gravenor v. Woodhouse*, 1822, 1 Bing. 38; *Cornish v. Searell*, 1828, 8 B. & C. 471; *Fenner v. Duplock*, 1824, 2 Bing. 10; *Doe v. Francis*, 1837, 2 Moo. & R. 57; *Gregory v. Doidge*, 1826, 3 Bing. 474; *Jew v. Wood*, 1841, 1 Cr. & Ph. 185; *Carlton v. Bowcock*, 1884, 51 L. T. 659.

(*c*) *Brook v. Biggs*, 1836, 2 Bing. N. C. 572.

SECT. III.—AN ACTUAL LETTING, OR AN AGREEMENT CAPABLE OF SPECIFIC ENFORCEMENT.

Subject to what is subsequently said as to the effect of an agreement to let since the Judicature Acts, a mere agreement, without any words of present demise, will not constitute the relation of landlord and tenant between the parties (*d*). In order to constitute such relation there must be an intention on the part of the one party to let, and of the other to hold as tenant. Mere occupation of premises by one of several tenants in common will not create a tenancy between him and the other tenants in common (*e*): nor will the occupation for partnership purposes of premises of one partner create a tenancy between that partner and the firm, even though by the partnership articles an annual sum is made payable as rent (*f*). And although words of present demise are made use of, yet if upon the whole instrument (*g*), and having regard to the nature of the subject-matter (*h*), it does not appear to have been intended by the parties to operate as a lease, but only as preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties (*i*).

When instruments are construed as mere agreements.

Thus, if there are matters to be ascertained, without which the terms of holding will not be perfectly complete (*k*); or if the instrument contains a stipulation that “a clause is to be added in the lease” for a particular purpose (*l*), or a proviso that the instrument shall not be

Instances of agreements.

(*d*) *Clayton v. Burtenshaw*, 1826, 5 B. & C. 41; *Phillips v. Hartley*, 1827, 3 C. & P. 121. See *Taylor v. Jackson*, 1846, 2 C. & K. 22.

(*e*) See cases cited in *Bailey v. Hobson*, 1869, 39 L. J. Ch. 270.

(*f*) *Ex parte Appleby*, 1872, 20 W. R. 411. An agreement for letting for a term on condition of rent being duly paid is not merely personal, and it passes an estate, see *Duxbury v. Sandiford*, 1899, 80 L. T. 552.

(*g*) See per Alderson, B., in *Gore v. Lloyd*, 1844, 13 L. J. Ex. at p. 372.

(*h*) *Doe v. Clare*, 1788, 2 T. R. 739, 744; *Fenny v. Child*, 1814, 12 M. & S. 255, 257; *Doe v. Powell*, 1844, 8 Sc. N. R. 687; 7 M. & Gr. 980.

(*i*) Bac. Abr. (K.) 817; *Doe v. Ashburner*, 1793, 5 T. R. 163. See *Morgan v. Bissell*, 1810, 3 Taunt. 65; *Browne v. Warner*, 1807, 14 Ves. 156; *Doe v. Smith*, 1805, 6 East, 530; *Tempest v. Rawling*, 1810, 12 East, 18; *Rawson v. Eicke*, 1837, 7 A. & E. 451; *Brashier v. Jackson*, 1840, 6 M. & W. 549; *Chapman v. Towner*, 1840, 6 M. & W. 100; *Bicknell v. Hood*, 1839, 5 M. & W. 104.

(*k*) *John v. Jenkins*, 1832, 1 Cr. & M. 227; *Jones v. Reynolds*, 1841, 1 Q. B. 506.

(*l*) *Doe v. Smith*, 1805, 6 East, 530.

construed or taken to operate as a lease or actual demise (*m*); or if the lease is to take effect only on the performance or happening of a condition (*n*); or if there is a want of certainty as to the time of commencement of the term and of the rent becoming due (*o*), or as to the amount of rent (*p*); or if strong circumstances of inconvenience are apparent on the instrument, if it should be construed as a lease (*q*); or if it appears by the instrument that the lessor has no present power to grant a lease (*r*); the instrument will be construed as a mere agreement for a lease, although it may contain words of present demise.

When instruments are construed as leases.

Instruments not under seal can now operate as leases only when the terms of years to which they relate will end within three years from the making of the instrument, and when the rent reserved during such term amounts to two-third parts at the least of the full improved value of the premises (*s*). Subject to this restriction, an instrument, although it may be designated an agreement, and may contain a stipulation for the execution of a future lease (*t*), will nevertheless be held to operate as a lease if it contains words of present demise, such as "I demise," "doth set and let," "doth agree to let" (*u*), "shall enjoy" (*v*), &c., uncontrolled by expressions of a contrary

(*m*) *Perring v. Brook*, 1835, 7 C. & P. 360.

(*n*) *Doe v. Clarke*, 1845, 7 Q. B. 211.

(*o*) *Dunk v. Hunter*, 1822, 5 B. & A. 322, 325. See *Clayton v. Burtenshaw*, 1826, 5 B. & C. 41.

(*p*) As where the rent is to be fixed by valuation, and no valuation is made: *John v. Jenkins*, 1832, 1 Cr. & M. 227. But see *M'Creesh v. M'Geough*, 1873, Ir. R. 7 C. L. 236.

(*q*) *Morgan v. Bissell*, 1810, 3 Taunt. 65; *Doe v. Powell*, 1844, 8 Sc. N. R. 687, 700; 7 M. & Gr. 980. See *Hayward v. Haswell*, 1837, 6 A. & E. 265.

(*r*) *Hayward v. Haswell*, 6 A. & E. 265. Cf. *Doe v. Foster*, 1846, 3 C. B. 215.

(*s*) See *infra*, p. 118.

(*t*) *Harrington v. Wise*, 1595, Cro. Eliz. 486; *Baxter v. Browne*, 1775, 2 W. Bl. 973; *Barry v. Nugent*, 1782, 3 Doug. 179; *Poole v. Bentley*, 1810, 12 East. 168; *Warman v. Faithfull*, 1834, 5 B. & Ad. 1042; *Doe v. Benjamin*, 1839, 9 A. & E. 644, 651; *Hancock v. Caffyn*, 1832, 8 Bing. 358, 368; *Doe v. Ries*, 1832, 8 Bing. 178; *Pearce v. Chestlyn*, 1835, 4 A. & E. 225; *Alderman v. Neate*, 1839, 4 M. & W. 704; *Wilson v. Chisholm*, 1831, 4 C. & P. 474; *Chapman v. Bluck*, 1838, 4 Bing. N. C. 187.

(*u*) *Staniforth v. Fox*, 1831, 7 Bing. 590; *Doe v. Benjamin*, *supra*; *Doe v. Ries*, *supra*; *Tarte v. Darby*, 1846, 15 M. & W. 601; *Furness v. Bond*, 1888, 4 T. L. R. 457.

(*v*) *Doe v. Ashburner*, 1793, 5 T. R. 163.

import, a specific rent being reserved, and the time at which the tenancy is to commence being clearly ascertained (*x*). And though there are no words of present demise, yet an instrument may operate as a lease, if it contains all the terms necessary for a lease, and if it appears that such was the intention of the parties (*y*). Thus an instrument under seal containing a covenant to grant a lease has been construed as a lease, the reservation of rent and other terms pointing to a present demise (*z*); and an agreement for a future lease, under which a person has entered into possession, not containing any words of present demise, but providing that in the meantime, until the lease shall be executed, the intended lessee shall pay the rent and perform the covenants, with a power of distress for non-payment of rent, will, it seems, have the same effect (*a*).

But a building agreement containing similar provisions, under which the builder is only to be entitled to leases after the erection of buildings, does not operate as a present demise (*b*); the builder is at most tenant at will (*b*); though when his right to the lease is complete he holds upon the agreed terms of the lease (*c*).

Building
agreement.

Entry under an agreement for a lease and payment of rent creates at law a tenancy from year to year on the terms of the agreement so far as they are applicable (*d*); but if the agreement is such that the Court would order it to be specifically performed, the lessee is in equity entitled to the premises for the term mentioned in the agreement, and since the Judicature Acts he is in the same position as though a lease had been actually executed. He is consequently subject to the same liabilities and he has the same rights as a lessee. He is liable for instance to distress, and, on the other hand, he cannot, like a tenant from year

Present effect
of an agree-
ment.

Walsh v.
Lonsdale.

(*x*) See note (*t*), p. 80.

(*y*) *Wright v. Prezerant*, 1828, 1 Moo. & M. 231. See *Rollason v. Leon*, 1861, 7 H. & N. 73.

(*z*) *Curling v. Mills*, 1843, 6 M. & Gr. 173.

(*a*) *Hancock v. Cuffyn*, 1832, 8 Bing. 358, 365. See *Pinero v. Judson*, 1829, 6 Bing. 206; *Anderson v. Midland Ry. Co.*, 1861, 3 E. & E. 614. But see *Doe v. Foster*, 1846, 3 C. B. 215.

(*b*) *Camden v. Batterbury*, 1859, 5 C. B. N. S. 808. It is usual to insert a provision expressly excluding a present demise; see *Holland v. Kensington Vestry*, 1867, L. R. 2 C. P. 565. As to liability for the sums reserved pending the lease, see *Adams v. Hagger*, 1879, 4 Q. B. D. 480; *Howlett v. Tarte*, 1861, 10 C. B. N. S. 813.

(*c*) *Lowther v. Hearer*, 1889, 41 C. D. 248.

(*d*) *Infra*, p. 94.

to year, be turned out at six months' notice (*e*). In cases, therefore, where an agreement for a lease is capable of specific performance, it is in general equivalent to a lease, and the cases above referred to have lost most of their importance. But the principle only applies where the Court before which the question arises has jurisdiction specifically to enforce the agreement. Hence, if the value of the premises exceeds 500*l.*, an agreement for a lease cannot be treated as a lease in proceedings in a county court (*f*). If, as the result of an action for specific performance against a tenant who has gone into possession under an agreement, it is ordered that possession shall be given up to the lessor, and possession is so given up, the relation of landlord and tenant is at an end, and the lessor cannot, on the principle of *Walsh v. Lonsdale*, distrain for arrears of rent upon chattels remaining on the premises (*g*).

Attornment.

An attornment is an admission by the person making it that he holds the premises as tenant under the person to whom it is made, and thereby the relation of landlord and tenant is created (*h*). Attornment is evidence of the title of the landlord (*i*), and unless it can be shown to have been made under a mistake, or to have been obtained by fraud or misrepresentation (*k*), it operates against the tenant as an estoppel.

Stamp on
attornment.

An attornment in writing which is simply an attornment—that is, where the tenant puts one person in the place of another as his landlord and holds on the same terms as before—does not require a stamp (*l*); but it is otherwise where the attornment is evidenced by a document which operates as a fresh contract (*m*).

(*e*) *Walsh v. Lonsdale*, 1882, 21 C. D. 9; *Crump v. Temple*, 1890, 7 T. L. R. 120. Cf. *Suain v. Ayres*, 1888, 21 Q. B. D. 289. And see *Allhusen v. Brooking*, 1884, 26 Ch. D. 559; *Re Maughan*, 1885, 14 Q. B. D. 956.

(*f*) *Foster v. Reeves*, 1892, 2 Q. B. 255.

(*g*) *Murgatroyd v. Old Silkstone, &c., Coal Co.*, 1895, 44 W. R. 198.

(*h*) See *Cooper v. Lands*, 1866, 14 L. T. 287. As to the former necessity of attornment upon the grant of the reversion, see *infra*, p. 413.

(*i*) *Doe v. Edwards*, 1836, 5 A. & E. 95.

(*k*) *Doe v. Brown*, 1837, 7 A. & E. 447. See *Cornish v. Searell*, 1828, 8 B. & C. 471.

(*l*) *Doe v. Edwards*, *supra*; *Doe v. Smith*, 1838, 8 A. & E. 255; *Barry v. Goodman*, 1837, 2 M. & W. 768.

(*m*) *Cornish v. Searell*, 1828, 8 B. & C. 471; *Doe v. Frankis*, 1840 11 A. & E. 792.

Formerly an attornment clause was inserted in mortgages in cases where the mortgagor was himself in occupation of the mortgaged premises, with a view to creating the relation of landlord and tenant between mortgagee and mortgagor, and vesting in the mortgagee, either expressly or impliedly, the power of distress which is incident to that relation (*n*); and although, as will presently appear, an attornment clause is not now effectual for this purpose, it is still constantly used to enable the mortgagee to get speedy possession.

Attornment
clause in
mortgage
deeds.

Ordinarily an attornment at a yearly rent creates a tenancy from year to year, even though the mortgagee retains the right of re-entry (*o*); but the nature of the tenancy depends on the agreement between the parties, and it may be a tenancy at will even though a yearly rent is reserved (*p*), or a term specified (*q*). If it is a tenancy at will it is determined by an assignment of the mortgage (*r*), or by the death of the mortgagor (*s*); and payment of interest on the mortgage by the heir does not renew the tenancy at will (*t*). To create the tenancy, it is not necessary for the mortgage deed to be executed by the mortgagee; it is sufficient if the mortgagor occupies under it (*u*).

Nature of
tenancy.

The tenancy created by attornment carries with it common law a power of distress against the goods of the mortgagor (*x*), and against such goods when vested in his trustee in bankruptcy (*y*); and also against the goods of strangers (*z*). But under the Bills of Sale Acts, 1878 and 1882, an attornment clause is ineffectual to create a power of distress *unless the mortgagee has taken possession previously*

Effect of
attornment
clause.

(*n*) See *Morton v. Woods*, 1869, L. R. 4 Q. B. 293; *Re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. 335; and *cf. Walker v. Giles*, 1848, 6 C. B. 662; 11 Geo. 2, c. 19, s. 11.

(*o*) *Re Threlfall*, 1880, 16 C. D. 274, explaining *Morton v. Woods* *supra*; *Ex parte Voisey*, 1882, 21 C. D. 442. As to right to re-enter notwithstanding the tenancy, see *Doe v. Olley*, 1840, 12 A. & E. 481; *Doe v. Tom*, 1843, 4 Q. B. 615; *Doe v. Goodier*, 1847, 10 Q. B. 957; *Met. Counties Assurance Co. v. Brown*, 1859, 4 H. & N. 428.

(*p*) *Pinhorn v. Souster*, 1853, 8 Ex. 763; *Turner v. Barnes*, 1862 2 B. & S. 435; *Doe v. Davies*, 1851, 7 Ex. 89.

(*q*) *Morton v. Woods*, *supra*.

(*r*) *Brown v. Metr. Counties, &c., Society*, 1859, 1 E. & E. 832.

(*s*) *Turner v. Barnes*, *supra*.

(*t*) *Scobie v. Collins*, 1895, 1 Q. B. 375.

(*u*) *Morton v. Woods*, *supra*; *West v. Fritche*, 1848, 3 Ex. 216; *Ex parte Voisey*, 1882, 21 C. D. 443.

(*x*) *West v. Fritche*, *supra*; *Morton v. Woods*, *supra*; *Ex parte Voisey*, *supra*.

(*y*) *Re Stockton Iron Furnace Co.*, *supra*.

(*z*) *Pinhorn v. Souster*, *supra*; *Kearsley v. Phillips*, 1883, 11 Q. B. D. 621.

to the demise by him (a), and the attornment clause itself is not a taking possession (b). But for other purposes the attornment clause is effectual, and, in particular, it enables the mortgagee to recover possession as landlord by a writ specially indorsed under R. S. C. Ord. 3, r. 6 (c).

SECT. IV.—EXCLUSIVE POSSESSION.

Lease.

In order that an instrument may operate as a lease it must confer the right to exclusive possession of the premises. A right of using the premises without exclusive possession will be construed as a licence (d), and not as a lease (e). An agreement to let "all the room and power" in a certain mill takes effect as a demise (f).

In deciding whether a transaction amounts to a letting or only to a licence, the question to be considered is whether, looking to the substance and context of the agreement, the owner intended to part with the possession of and control over the property, or whether the agreement is merely for the use of the property in a certain way and on certain terms while it remains in the possession and under the control of the owner (g). The Court will not look so much to the words as to the substance of the agreement (h); and although there are no express words giving a right to exclusive occupation, yet if the nature of the acts to be done by the grantee requires such a right (i), the agreement will be held to amount to a letting (k).

(a) *Re Willis*, 1888, 21 Q. B. D. 384. See sect. 6 of the Act of 1878.

(b) *Green v. Marsh*, 1892, 2 Q. B. 330.

(c) *Mumford v. Collier*, 1890, 25 Q. B. D. 279.

(d) As to stamping a licence, see *Conservators of R. Thames v. Comm. of In. Rev.*, 1886, 18 Q. B. D. 279; *National Telephone Co. v. Comm. of In. Rev.*, 1899, 1 Q. B. 250.

(e) *Taylor v. Caldwell*, 1863, 3 B. & S. p. 832; *Hancock v. Austin*, 1863, 14 C. B. N. S. 634; *L. & N. W. Ry. v. Buckmaster*, 1875, L. R. 10 Q. B. 70, 444. See *Jones v. Reynolds*, 1836, 4 A. & E. 805; *Municipal Freehold Land Co. v. Met., &c., Joint Committee*, 1883, C. & E. 184; *Rendell v. Roman*, 1893, 9 T. L. R. 192.

(f) *Marshall v. Schofield*, 1882, 52 L. J. Q. B. 58.

(g) *Wells v. Kingston-upon-Hull*, 1875, L. R. 10 C. P. at p. 408. See *Cory v. Bristow*, 1877, 2 App. Cas. at p. 276.

(h) *Smith v. St. Michael, Cambridge*, 1860, 3 E. & E. p. 390.

(i) See *Crosby v. Walsworth*, 1805, 6 East, 602; but cf. *Mogy v. Yutton*, 1880, 29 W. R. 74.

(k) *Roads v. Trumpington*, 1870, L. R. 6 Q. B. 56, 64. Considerable weight was attached in the judgments in this case to the circumstance

On the other hand, although the parties use words appropriate to a lease, yet if from the whole agreement it appears that the grantor is to retain possession of the property and merely to give the grantee a concurrent right of user, the agreement will be held to amount to a licence only (*l*).

A licence is not exclusive unless it is either expressed to be so, or an intention that it should be so can be clearly inferred from the language of the agreement (*m*). A mere liberty of digging for minerals in another's soil does not confer an exclusive right to the minerals (*n*); and perhaps it is the same even where the grantee covenants effectually to work the mines (*o*). But while the licensor retains the right to grant fresh licences, he must not thereby defeat his own previous grant (*p*), or defeat the known objects of the first licensee in applying for his licence (*q*).

The following are instances of licences:—

GRATUITOUS LOAN of shed for a specified purpose (*r*).

AGREEMENT to let and take Music Hall and Gardens for four days for the purpose of giving a series of four concerts; the terms of the agreement showing that the owner was not to give up exclusive possession to the hirer (*s*).

AGREEMENT under which the owner of lace-machines hired standing room for them in a room in a factory; steam power to be supplied by the owner of the

Instances of
licences.

that the agreement provided that the land was to be "entered upon" and "delivered up" by the grantee.

(*l*) *Taylor v. Caldwell*, 1863, 3 B. & S. 826, 832. It has been considered a circumstance of importance, as showing the intention of the parties that a licence only should be granted, that under the agreement the grantor is to pay all rates, tithes, and taxes: *Mogg v. Yutton*, 1880, 29 W. R. 74.

(*m*) *D. of Sutherland v. Heathcote*, 1892, 1 Ch. 475, 485.

(*n*) *D. of Sutherland v. Heathcote*, *supra*; *Chetham v. Williamson*, 1804, 4 East, p. 476. See *Earl of Huntingdon v. Lord Mountjoy*, 1583, 4 Leon. 147. Such a right is more than a mere licence; it is a *profit à prendre*: *Wickham v. Hawker*, 1840, 7 M. & W. p. 78; *D. of Sutherland v. Heathcote*, *loc. cit.* p. 483; *Hooper v. Clark*, 1867, L. R. 2 Q. B. 200.

(*o*) *Doe v. Wood*, 1819, 2 B. & Ald. 724. But see *Carr v. Benson*, 1868, 3 Ch., per Wood, L.J., at p. 532.

(*p*) *Newby v. Harrison*, 1861, 1 J. & H. p. 397.

(*q*) *Carr v. Benson*, *supra*.

(*r*) *Williams v. Jones*, 1864, 3 H. & C. 256.

(*s*) *Taylor v. Caldwell*, 1863, 3 B. & S. 826. As to the holder of a refreshment stall at an exhibition, see *Reg. v. Morrish*, 1863, 32 L. J. M. C. 245.

factory, who reserved the right of entering the room for the purpose of attending to the running gear (*t*).

LIBERTY to lay and stack coals upon land (*u*).

GRANT of liberty and licence in consideration of an annual sum of 30*l.* to fasten, and thenceforth keep fastened, a coal hulk to the moorings placed by the conservators in the river Thames until either party should have given the other one calendar month's notice in writing to determine the licence (*x*).

GRANT of sole and exclusive right or liberty to put or use boats on a canal for the purposes of pleasure, and to let the same for hire for purposes of pleasure only (*y*).

GRANT of leave and licence to search for, get, and carry away all the copperas stone or pyrites which might be found in a certain part of a manor for twenty-one years at a yearly rental, with proviso for re-entry on non-payment of rent (*z*).

GRANT of power and authority to dig fireclay from under certain land for twenty-one years (*a*).

Effect of
licence.

A mere licence does not confer any estate in the property to which it relates (*b*) ; the licensee is not liable to be rated as occupier (*c*) ; and the licensor cannot, in the absence of an express power of distress, distrain for any annual or other sum which may be reserved as a recompense for the licence (*d*). The licence in fact properly passes no interest, but only makes an action lawful which without it would have been unlawful (*e*). It is determined by an assignment

(*t*) *Hancock v. Austin*, 1863, 14 C. B. N. S. 634.

(*u*) *Wood v. Lake*, 1751, reported 13 M. & W. at p. 848, note (*a*); Sayer, 3. But see Sugd. V. & P. 14th ed. p. 123. See also *Webb v. Paternoster*, 1620, 2 Rol. Rep. 143, 152 ; and see 13 M. & W. p. 843.

(*x*) *Watkins v. Overseers of Milton*, 1868, L. R. 3 Q. B. 350.

(*y*) *Hull v. Tupper*, 1863, 2 H. & C. 121.

(*z*) *Ward v. Day*, 1863, 4 B. & S. 337, 355. See *Doe v. Wood*, 1819, 2 B. & Ald. 724, 738.

(*a*) *Carr v. Benson*, 1868, L. R. 3 Ch. 524, 532. See *Chetham v. Williamson*, 1804, 4 East, 469.

(*b*) *Thomas v. Sorrel*, 1674, Vaughan, p. 351.

(*c*) *Watkins v. Overseers of Milton*, 1868, L. R. 3 Q. B. 350 ; *L. & N. W. Ry. Co. v. Buckmaster*, 1875, L. R. 10 Q. B. 444 ; *Cory v. Bristow*, 1877, 2 App. Cas. 262.

(*d*) *Ward v. Day*, 1863, 4 B. & S. 337 ; see p. 349.

(*e*) *Thomas v. Sorrel*, *supra*. See *Heap v. Hartley*, 1889, 42 C. D. 461.

of the subject-matter in respect of which the privilege is enjoyed (*f*). And a licence, whether under seal or by parol, is revocable (*g*), unless it is coupled with a grant (*h*), or unless, upon the faith of it, expense has been incurred by the licensee (*i*). A licence to search for and carry away minerals, being a licence coupled with an interest, is irrevocable (*l*). Such a licence is also capable of assignment (*l*), and covenants may be made to run with it (*m*). A licence to put goods on land, though revocable at any time, involves a permission to the licensee to take the goods away, and the licensee is entitled to notice of revocation, and also to a reasonable time afterwards for removing the goods (*n*). But though a licence may be revocable, the licensee is entitled to damages if the revocation is a breach of contract (*o*).

An occupation of premises by a servant or agent for the more convenient performance of service is in law the occupation of the master and not of the servant, and not the less that the occupation is treated as a partial remuneration for the services (*p*); and it does not create the relation of landlord and tenant between the parties (*q*). It is the same where the servant is required by the employer to reside on the premises with a view to the more efficient performance of his services, though he might perform them elsewhere (*r*); but where the requirement is purely arbitrary on the part of the master, or the occupation is merely permissive and does not lead to the more efficient performance

Occupation
by a servant.

(*f*) *Coleman v. Foster*, 1856, 1 H. & N. 37.

(*g*) *R. v. Hornloun on the Hill*, 1816, 4 M. & S. 562.

(*h*) *Wool v. Leadbitter*, 1845, 13 M. & W. 838.

(*i*) *Winter v. Brockwell*, 1807, 8 East, 308; *Liggins v. Inge*, 1831, 7 Bing. 682. See *Davies v. Marshall*, 1861, 10 C. B. N. S. p. 711.

(*l*) *Muskett v. Hill*, 1839, 5 Bing. N. C. 694. A mere licence cannot be assigned; see *Re Davis*, 1888, 22 Q. B. D. 197.

(*m*) *Norval v. Pascoe*, 1864, 34 L. J. Ch. 82.

(*n*) *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 334; *Mellor v. Watkins*, 1874, L. R. 9 Q. B. 400; *Aldin v. Latimer, Clark & Co.*, 1894, 2 Ch. 437.

(*o*) *Kerrison v. Smith*, 1897, 2 Q. B. 445. Cf. *Smart v. Jones*, 1864, 15 C. B. N. S. 717.

(*p*) *Bertie v. Beaumont*, 1812, 16 East, 33, 36; *Rex v. Kelstern*, 1816, 5 M. & S. 136; *Rex v. Cheshunt*, 1818, 1 B. & Ald. 473; *Hunt v. Colson*, 1833, 3 Moo. & Sc. 790; *White v. Bayley*, 1861, 10 C. B. N. S. 227.

(*q*) *Mayhew v. Suttle*, 1854, 4 E. & B. 347.

(*r*) *Fox v. Dalby*, 1874, L. R. 10 C. P. 285; *Reg. v. Spurrell*, 1865, L. R. 1 Q. B. 72; *Dobson v. Jones*, 1844, 5 Man. & Gr. 112.

of the duties, the occupation is that of the servant (*s*); and so, too, where the occupation is solely as remuneration for services (*t*).

Lease of
flat.

If on taking a lease of a flat, the parties have bargained on the footing of gas being supplied, the landlord is not entitled to cut off the gas, even though the tenant has not repaid him what he has himself paid for it: his remedy is by action (*u*). Where the landlord undertakes to employ a porter, the Court will not interfere to compel a proper appointment being made (*u*).

Lodgers.

Unless it is otherwise stipulated at the time of taking lodgings, a lodger is entitled to the use of the general conveniences of the house (*x*). The law imposes no obligation on a lodging-house keeper to answer for the goods of his lodger (*y*), and in the absence of gross negligence he is not liable for their loss (*z*).

(*s*) *Smith v. Seghill*, 1875, L. R. 10 Q. B. 422.

(*t*) *Hughes v. Overseers of Chatham*, 1843, 5 Man. & Gr. p. 78; *Marsh v. Estcourt*, 1889, 24 Q. B. D. 147. But see *Doe v. Derry*, 1840, 9 C. & P. 494.

(*u*) *Hersey v. White*, 1893, 9 T. L. R. 335.

(*w*) *Ryan v. Mutual Tontine, &c. Association*, 1893, 1 Ch. 116.

(*x*) *Underwood v. Burrows*, 1835, 7 C. & P. 26.

(*y*) *Holder v. Soulby*, 1860, 8 C. B. N. S. 254.

(*z*) *Clench v. D'Arenberg*, 1883, C. & E. 42; *Espir v. Todd*, 1883, C. & E. 154.

CHAPTER II.

THE DIFFERENT KINDS OF TENANCY.

	PAGE
SECT. I. TENANCY BY SUFFERANCE.	89
SECT. II. TENANCY AT WILL	90
Where implied	90
Effect of payment of rent	92
SECT. III. TENANCY FROM YEAR TO YEAR	93
Where implied	93
How implication may be rebutted.	95
Terms consistent with	97
SECT. IV. TENANCY FOR A TERM OF YEARS	98
SECT. V. TENANCY FOR LIFE	100

SECT. I.—TENANCY BY SUFFERANCE.

A TENANT by sufferance is one who at first came in by a lawful demise, but after his estate is ended wrongfully holds over (*a*) ; as, for instance, a tenant for the life of another (*b*), or for years determinable on life, who continues in possession after the decease of the person for whose life he holds (*c*) ; or a tenant who holds over after his lease has determined by the death of a lessor who was only tenant for life (*d*) ; or a tenant for years who holds over after the expiration of his term (*e*) ; or an under-tenant who continues in possession after the determination of the original lease (*f*) ; or a lessee at will who keeps possession after the will has been determined by the death of the lessor or otherwise (*g*). Instances.

(*a*) Co. Litt. 57 b.

(*b*) *Allen v. Hill*, 1590, Cro. Eliz. 238.

(*c*) Co. Litt. 57 b. See judgment in *Shields v. Atkins*, 1747, 3 Atk. p. 562.

(*d*) *Roe v. Ward*, 1789, 1 H. Bl. 96.

(*e*) Co. Litt. 57 b, 270 b. See *Bayley v. Bradley*, 1848, 5 C. B. 396.

(*f*) *Sinkin v. Ashurst*, 1834, 1 Cr. M. & R. 261 ; 4 Tyr. 781.

(*g*) *Doe v. Turner*, 1840, 7 M. & W. 226, 9 M. & W. 643. For other instances of tenancy by sufferance, see *Doe v. Lawder*, 1816, 1 Stark. 308 ; *Doe v. Quigley*, 1810, 2 Camp. 505 ; *Day v. Day*, 1871, L. R. 3 P. C. 751, p. 760.

Effect of
assent of
owner.

This so-called tenancy was probably originally a mere device to prevent adverse possession from taking place, but under the present law it has no such effect (*h*). It necessarily implies the absence of any agreement between the parties, and by the assent of the owner to the continuance of possession by the tenant it will be converted into a tenancy at will, or by payment of rent with reference to a yearly holding a tenancy from year to year may be created (*i*).

Against the Crown there can be no tenancy by sufferance (*k*).

SECT. II.—TENANCY AT WILL.

How created.

Expressly.

“Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him” (*l*). But every lease at will must in law be at the will of both parties, and therefore when a lease is made to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also; and when a lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor (*m*).

By implication.

Tenancy at will arises by contract (*n*) and may be created by express agreement (*o*), but it also arises by implication where premises are in the occupation of a person holding them with the consent of the owner—that is, “an affirmative consent, and not a mere negative or silent consent” (*p*)—but not having any freehold estate or definite term in them (*q*). Hence a tenancy at will is implied in the following cases:—

- (*h*) *Infra*, p. 519.
- (*i*) *Bishop v. Howard*, 1823, 3 Dow. & R. 293.
- (*k*) Co. Litt. 57 b.
- (*l*) Litt. sect. 68.
- (*m*) Co. Litt. 55 a.
- (*n*) *Ley v. Peter*, 1858, 3 H. & N. 101, per Bramwell, B., p. 107.
- (*o*) *Richardson v. Langridge*, 1811, 4 Taunt. 128; *Doe v. Cox*, 1847, 11 Q. B. 122.
- (*p*) *Ley v. Peter*, 1858, 3 H. & N. p. 108.
- (*q*) *Doe v. Pullen*, 1836, 2 Bing. N. C. 749.

Where a person lives in a house rent free by the permission of the owner (*r*) ; provided the occupation is not in the capacity of servant or agent, or as a mere remuneration for services (*s*). Thus a dissenting minister who occupies a house under trustees in whom the legal estate is vested, occupies as tenant at will (*t*).

Formerly a tenancy at will arose by implication where possession was taken with the consent of the intended lessor (*u*), under an agreement for a lease (*x*), or under an invalid lease (*y*), and no rent had been paid. But, as already explained (*z*), an intending lessee who has entered into possession under an agreement for a lease which is capable of being specifically enforced now holds as though the lease had been actually granted in pursuance of the agreement. But a tenancy at will arises where possession is taken provisionally during negotiations for a lease (*a*).

Where possession is taken in pursuance of an agreement for the sale of premises (*b*). In the absence of an agreement to pay for the occupation, no action for use and occupation can be brought against the vendee whilst he is in possession under the contract of sale, because, although a tenant at will, he is not bound to pay rent (*c*). After the

1. Occupation rent free by permission of owner.

2. Occupation under agreement for lease, or void lease.

3. Occupation under purchase agreement.

(*r*) *Rex v. Collett*, 1823, R. & R. C. C. 498 ; *Rex v. Jobling*, 1823, R. & R. C. C. 525 ; *Doe v. Groves*, 1847, 10 Q. B. 486. See *Smith v. Seaghill*, 1875, L. R. 10 Q. B. p. 429.

(*s*) *Supra*, p. 87.

(*t*) *Doe v. Jones*, 1830, 10 B. & C. 718 ; *Doe v. M'Kaeg*, 1830, 10 B. & C. 721 ; *Perry v. Shipway*, 1859, 1 Giff. 1.

(*u*) See *Doe v. Quigley*, 1810, 2 Camp. 505.

(*x*) *Coatsworth v. Johnson*, 1886, 55 L. J. Q. B. 220 ; judgment of Littledale, J., in *Hamerton v. Stead*, 1824, 3 B. & C. at p. 483 ; judgment of Parke, B., in *Braythwaite v. Hitchcock*, 1842, 10 M. & W. at p. 497 ; *Anderson v. Midland Ry. Co.*, 1861, 3 E. & E. 614. See *Regnart v. Porter*, 1831, 7 Bing. 451.

(*y*) *Goodtitle v. Herbert*, 1792, 4 T. R. 680 ; *Denn v. Fearnside*, 1747, 1 Wils. 176.

(*z*) *Supra*, p. 81.

(*a*) *Coggan v. Warwick*, 1852, 3 C. & K. 40. See *Pollen v. Brewer*, 1859, 7 C. B. N. S. 371.

(*b*) *Right v. Beard*, 1811, 13 East, 210 ; *Doe v. Jackson*, 1823, 1 B. & C. 448 ; *Doe v. Miller*, 1833, 5 C. & P. 595 ; *Doe v. Rock*, 1842, Car. & M. 549 ; 4 M. & Gr. 30 ; *Bull v. Cullimore*, 1835, 2 Cr. M. & R. 120 ; *Doe v. Chamberlaine*, 1839, 5 M. & W. 14 ; *Howard v. Shaw*, 1841, 8 M. & W. 118.

(*c*) *Winterbottom v. Ingham*, 1845, 7 Q. B. 611 ; *Hearn v. Tomlin*, 1793, Peake, N. P. C. 192 ; *Kirtland v. Pounsett*, 1809, 2 Taunt. 145. See *Tew v. Jones*, 1844, 13 M. & W. 12.

purchase has gone off, the person remaining in possession still continues tenant at will, but as the payment of the purchase-money, which was to be the compensation for his occupation, is then at an end, he becomes from that time liable to an action for use and occupation (*d*).

4. Holding over during treaty for new lease.

Where a tenant, after his lease has expired, is permitted (*e*) to continue in possession pending a treaty for a new lease (*f*). But if he was in possession under a lease for a year, and by the consent of the lessor holds over as tenant, the law implies a revocation of the contract, and he holds for another year (*g*).

5. Indefinite letting.

A mere general letting (*h*), or a simple permission to occupy, creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year; as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of the year (*i*).

6. Occupation by *cestui que trust*.

A *cestui que trust*, who is in possession of an estate by the consent or acquiescence of the trustee, is regarded at law as his tenant at will (*k*). But this doctrine only applies where the *cestui que trust* is the actual occupant; where he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of occupying tenants, he is only the agent or bailiff of the trustee (*l*).

Effect of payment of rent.

In all these cases, however, payment of rent by the tenant with reference to a yearly holding (*m*), or an admission by him of a charge of a part of a yearly rent in an account between him and his landlord (*n*), will raise a presumption

(*d*) Judgments of Parke, B., and Alderson, B., in *Howard v. Shaw*, 1841, 8 M. & W. 118; *Markey v. Coote*, 1876, Ir. R. 10 C. L. 149, 155.

(*e*) If there is no evidence of the landlord's permission, the tenancy will be at sufferance only: *Sinkin v. Ashurst*, 1834, 1 Cr. M. & R. 261.

(*f*) *Doe v. Stennett*, 1799, 2 Esp. 717, 719.

(*g*) *Right v. Darby*, 1786, 1 T. R. 159; *Dougal v. McCarthy*, 1893, 1 Q. B. 736.

(*h*) Judgment of Chambre, J., in *Richardson v. Langridge*, 1811, 4 Taunt. at p. 132; *Roe v. Lees*, 1778, 2 W. Bl. at p. 1173. But see *Doe v. Watts*, 1797, 7 T. R. at p. 85.

(*i*) Per Parke, B., in *Doe v. Wood*, 1845, 14 M. & W. at p. 687; *Doe v. Gardiner*, 1852, 12 C. B. 319. See *In re Stroud*, 1849, 8 C. B. 502; *Fitzmaurice v. Bayley*, 1857, 8 E. & B. at p. 679.

(*k*) *Garrard v. Tuck*, 1849, 8 C. B. 231.

(*l*) *Melling v. Leak*, 1855, 16 C. B. 652, 669.

(*m*) See *Doe v. Wood*, 1845, 14 M. & W. 682, 687.

(*n*) *Cox v. Bent*, 1828, 5 Bing. 185. See *Vincent v. Godson*, 1854, 4 D. M. & G. p. 553.

of a change from a tenancy at will into a tenancy from year to year (*o*). But rent may be expressly reserved upon a lease at will, and payment in pursuance of such reservation will not change the character of the tenancy (*p*).

SECT. III.—TENANCY FROM YEAR TO YEAR.

Tenancy from year to year differs from tenancy at will in the notice required to be given by landlord or tenant in order to determine the tenancy (*q*), though a tenancy from year to year created by the attornment of a mortgagor to the mortgagee, is not turned into a tenancy at will by a general power to re-enter without notice (*r*). A tenancy from year to year does not determine and recommence with every year (*s*), but the tenant has a lease for one year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it (*t*). And a similar rule holds with regard to other recurring tenancies, such as weekly tenancies (*u*).

Distinguished from tenancy at will.

This tenancy may be either expressly created, by letting premises to hold "from year to year" (*x*); or may arise by implication where rent (*y*) is paid in respect of the occupation of premises, and with reference to a yearly holding (*z*).

Where implied.

Formerly where a person had entered into possession of

1. Entry and payment of

(*o*) See *infra*, sect. 3.

(*p*) *Doe v. Cox*, 1847, 11 Q. B. 122; *Doe v. Davies*, 1851, 7 Ex. 89.

(*q*) *Infra*, Chap. VI., sect. 1 (3).

(*r*) *Re Threlfull*, 1880, 16 C. D. 274.

(*s*) *Tomkins v. Lawrance*, 1839, 8 C. & P. 729, *contra*, is overruled. See *Reg. v. Thornton*, 1860, 2 E. & E. p. 792.

(*t*) *Cuttley v. Arnold*, 1859, 1 J. & H. 651; *Wright v. Tracey*, 1874, 8 Ir. R. C. L. 478; *Gandy v. Jubber*, 1865, 9 B. & S. 15; *Oxley v. James*, 1844, 13 M. & W. 209, per Parke, B., at p. 214.

(*u*) *Bowen v. Anderson*, 1894, 1 Q. B. 164; dissenting from *Sandford v. Clarke*, 1888, 21 Q. B. D. 398.

(*x*) *Infra*, Chap. III. sect. 2, p. 144. Where a right of way was granted to A., his heirs and assigns, A. being a tenant from year to year, who subsequently to the grant acquired the fee, it was held that the right of way went with the freehold title thus acquired: *Rymer v. McIlroy*, 1897, 1 Ch. 528.

(*y*) Or a render in the nature of rent. See *Doe v. Morse*, 1830, 1 B. & Ad. p. 369.

(*z*) Per Parke, B., in *Braythwayte v. Hitchcock*, 1842, 10 M. & W. at p. 497. See *Doe v. Wood*, 1845, 14 M. & W. 682; *Reg. v. Norwich Incorporation*, 1874, 30 L. T. 704.

rent under
void lease or
agreement.

premises and paid rent (*a*) under a void lease (*b*), or under an agreement for a lease (*c*)—although such agreement was unwritten, and therefore invalid (*d*), and no lease had ever been tendered by the lessor or demanded by the lessee (*e*)—he was presumed to be tenant from year to year upon such of the terms of the agreement as were consistent with that tenancy (*f*), and reference might be made to the instrument to ascertain the terms of the tenancy (*g*), including the dates of the beginning and ending of the year (*h*). A tenancy from year to year might arise in this way under a corporation, although there had been no demise under seal (*i*), unless the possession could be otherwise explained (*k*); but it seems that a corporation could not thus become tenants from year to year (*l*). The tenancy thus implied ceased without any notice to quit at the end of the term mentioned in the instrument (*m*). But now, where the entry is under

(*a*) See *Cox v. Bent*, 1828, 5 Bing. 185; *supra*, p. 92. See *Vincent v. Godson*, 1854, 4 D. M. & G. 546.

(*b*) *Doe v. Bell*, 1793, 5 T. R. 471; *Doe v. Watts*, 1797, 7 T. R. 83; *Clayton v. Blakey*, 1798, 8 T. R. 3 (see notes to this case in 2 Sm. L. C. 10th ed. p. 125); *Richardson v. Gifford*, 1834, 1 A. & E. 52; *Doe v. Collinge*, 1849, 7 C. B. 939, 960; *Lee v. Smith*, 1854, 9 Ex. 662; *Doe v. Tanriere*, 1848, 12 Q. B. 998, 1013; *Doe v. Moffatt*, 1850, 15 Q. B. 257; *Tress v. Savage*, 1854, 4 E. & B. 36; *Martin v. Smith*, 1874, L. R. 9 Ex. 50.

(*c*) *Doe v. Smith*, 1827, 1 Man. & Ry. 137; *Mann v. Lovejoy*, 1826, Ry. & M. 355; *Knight v. Bennett*, 1826, 3 Bing. 361; *Cox v. Bent*, *supra*; *Doe v. Amey*, 1840, 12 A. & E. 476; *Doe v. Foster*, 1846, 3 C. B. 215; *Chapman v. Towner*, 1840, 6 M. & W. 100; *Braythwaite v. Hitchcock*, 1842, 10 M. & W. 494; *Bennett v. Ireland*, 1858, E. B. & E. 326. See *Bolton v. Tomlin*, 1836, 5 A. & E. 856.

(*d*) *Knight v. Bennett*, 1826, 3 Bing. 361.

(*e*) *Weakly v. Bucknell*, 1776, Cowp. 473.

(*f*) 2 Smith, L. C., 10th ed. 117; *Doe v. Bell*, *supra*; *Richardson v. Gifford*, *supra*; *Doe v. Amey*, *supra*; *Mann v. Lovejoy*, *supra*; *Beale v. Sanders*, 1837, 3 Bing. N. C. 850; *Tress v. Savage*, *supra*; *Roe v. Ward*, 1789, 1 H. Bl. 97.

(*g*) Per Martin, B., in *Lee v. Smith*, 1854, 9 Ex. at p. 665; *Bolton v. Tomlin*, 1836, 5 A. & E. 856; *De Medina v. Polson*, 1815, Holt, N. P. 47. See *Cumberland v. Bowes*, 1854, 15 C. B. 348.

(*h*) *Kelly v. Patterson*, 1874, L. R. 9 C. P. 681.

(*i*) *Doe v. Tanriere*, 1848, 12 Q. B. 998; *Woods v. Tate*, 1896, 2 B. & P. N. R. 247; *Ecclesiastical Commissioners v. Merrill*, 1869, L. R. 4 Ex. 162.

(*k*) *Re Northumberland Avenue Hotel Co.*, 1886, 33 C. D. p. 20, per Cotton, L.J.

(*l*) *Finlay v. Bristol and Exeter Ry. Co.*, 1852, 7 Ex. 409.

(*m*) *Doe v. Stratton*, 1828, 4 Bing. 446; *Berrey v. Lindley*, 1841, 3 M. & Gr. p. 513; *Doe v. Moffatt*, 1850, 15 Q. B. 257; *Tress v. Savage*, 1854, 4 E. & B. 36.

an agreement capable of being enforced, the tenant is in general in the same position as though the lease had been granted in pursuance of the agreement (*n*).

A tenant who continues in occupation after his lease has expired, and pays rent, is presumed to hold as tenant from year to year on such of the covenants and conditions of the former lease as are applicable to a tenancy from year to year (*o*). Where a bankrupt tenant continues to occupy, and the trustee takes no steps, he holds after his discharge as tenant from year to year on the terms of the original agreement (*p*).

Where the lessee under a lease which becomes void on the death of the lessor continues in possession of the demised premises after that event, and pays rent to the succeeding owner, the latter, by accepting such rent, admits that the person in possession is his tenant from year to year, and, in the absence of evidence to the contrary, the tenancy will be upon such of the former terms as are consistent with a yearly tenancy (*q*).

In order to give rise to the presumption of a tenancy from year to year in the above cases it is necessary that possession should be taken or kept under such circumstances as to allow a contract for such a tenancy to be implied; and whether this is so or not is a question for a jury to decide on the circumstances of each case (*r*). The rent must also have been paid with reference to a yearly holding (*s*). But the receipt of rent is only evidence; it is not conclusive proof of the creation or ratification of a tenancy (*t*). It is

2. Holding over and payment of rent after expiration of lease.

3. Holding over and payment of rent under lease made by tenant for life.

Presumption of tenancy from year to year may be rebutted.

1. By proof that possession was not taken under implied tenancy.

(*n*) *Supra*, p. 81.

(*o*) *Digby v. Atkinson*, 1815, 4 Camp. 275; *Bishop v. Howard*, 1823, 2 B. & C. 100; *Hyatt v. Griffiths*, 1851, 17 Q. B. 505; *Finch v. Miller*, 1848, 5 C. B. 428; *Dougal v. McCarthy*, 1893, 1 Q. B. p. 740, per Lord Esher, M.R. As to effect of holding over by the mesne tenant upon a sub-tenancy, see *Peirse v. Sharr*, 1828, 2 Man. & Ry. 418.

(*p*) *Ponsford v. Abbott*, 1884, C. & E. 225.

(*q*) *Doe v. Watts*, 1797, 7 T. R. 83; *Doe v. Morse*, 1830, 1 B. & Ad. 365, 369; *Wyatt v. Cole*, 1877, 36 L. T. 613. See *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 334.

(*r*) *Finlay v. Bristol and Exeter Ry. Co.*, 1852, 7 Ex. at pp. 417, 420; *Jones v. Shears*, 1836, 4 A. & E. 832.

(*s*) *Braythwayte v. Hitchcock*, 1842, 10 M. & W. 494, 497. See *Richardson v. Langridge*, 1811, 4 Taunt. 128, 132; *Doe v. Wood*, 1845, 14 M. & W. 682; *R. v. Herstmonceaux*, 1827, 7 B. & C. 551.

(*t*) *Smith v. Widdlake*, 1877, 3 C. P. D. 10. See *Doe v. Morse*, 1830, 1 B. & Ad. 365; *Finlay v. Bristol and Exeter Ry. Co.*, 1852, 7 Ex. p. 420; *Doe v. Tanierre*, 1848, 12 Q. B. p. 1013.

2. By proof of circumstances under which rent was paid or received.

competent to either the payer or receiver of rent to prove the circumstances under which the payment was made, and by such circumstances to repel the legal implication which would arise from the receipt of rent unexplained (*u*). Thus, a landlord, who has received rent from a tenant holding over, may show that such rent was accepted by him in ignorance of the death of a person for whose life the premises were held (*x*). A substantial disparity between the rent paid and the value of the premises, may be a ground for deciding against a tenancy from year to year (*y*); and such a tenancy is not implied from payment of rent for lodgings, though paid with reference to a year or an aliquot part thereof (*z*).

Presumption that tenancy is at former terms may also be rebutted.

The presumption that the tenancy from year to year implied from possession under a void lease or an agreement for a lease is on the terms of the lease or agreement, or that the similar tenancy implied from holding over after the expiration of a lease is on the terms of the expired lease, may be rebutted by evidence of an intention to hold on different terms. The terms of the holding are matter of evidence rather than of law, and the question is one of fact for the jury (*a*). A mere alteration in the rent will not, however, rebut the presumption that the tenant holds on the other terms of the former contract (*b*). A reversioner who has received rent under a lease granted by a tenant for life, which determined on his death, may show that he was ignorant of a special covenant on the part of the lessor contained in such lease; and in that case, if there is no other evidence that he agreed to the tenancy continuing on the former terms than such payment and receipt of rent, he will not be bound by the covenant (*c*).

(*u*) Per Wilde, C.J., in *Doe v. Crago*, 1848, 6 C. B. at p. 98; *Cumden v. Batterbury*, 1860, 7 C. B. N. S. 864; *Right v. Barden*, 1803, 3 East, 260; *Mildmay v. Shirley*, 1806, cited in 10 East, 164; *Doe v. Francis*, 1837, 2 Moo. & R. 57.

(*x*) *Doe v. Crago*, 1848, 6 C. B. 90.

(*y*) *R. v. Prideaux*, 1808, 10 East, 158; *Smith v. Willlake*, 1877, 3 C. P. D. 10.

(*z*) *Wilson v. Abbott*, 1824, 3 B. & C. 88.

(*a*) *Mayor of Thetford v. Tylor*, 1845, 8 Q. B. 95; *Johnson v. St. Peter's, Hereford*, 1836, 4 A. & E. 520; *Elgar v. Watson*, 1842, Car. & M. 494; *Oakley v. Monck*, 1866, L. R. 1 Ex. 159.

(*b*) *Digby v. Atkinson*, 1816, 4 Camp. 275; *Doe v. Geekie*, 1844, 5 Q. B. 841.

(*c*) *Oakley v. Monck*, *supra*.

An implied tenancy from year to year is presumed to commence on the same day of the year as the original tenancy (*d*) ; but this also has been held to be a question for the decision of a jury, upon a consideration of all the facts of each case (*e*).

Commence-
ment of im-
plied tenancy.

When it is said that a person becoming tenant from year to year may be deemed to hold over on the terms of a prior lease, that rule cannot be confined to such terms as are necessarily incident to a yearly tenancy, for it would then have no meaning. It must include such terms as may be incident to such a tenancy (*f*). The following terms have been held to be consistent with a tenancy from year to year :—Covenants to keep premises in repair (*g*) ; to pay rent (damage by fire excepted) (*h*) ; to keep open a shop, and to use best endeavours to promote the trade of it during the tenancy (*i*) ; that the tenant may retain and sow forty acres of wheat on the arable land demised at the seed time next after the end of the term, and have the standing thereof until the harvest then next following, rent free, with the use of premises for threshing, &c., till a certain day (*k*) ; that an outgoing tenant shall be paid for tillages on the expiration of his tenancy (*l*), or shall have away-going crops (*m*) ; that the tenant shall leave all the manure upon the farm at the end of his tenancy (*n*) ; covenants against taking successive crops of corn (*o*) ; and stipulations

Terms con-
sistent with
tenancy from
year to year.

(*d*) *Roe v. Ward*, 1789, 1 H. Bl. 97 ; *Doe v. Weller*, 1798, 7 T. R. 478.

(*e*) *Walker v. Godè*, 1861, 6 H. & N. 594. See observations of Pollock, C.B., in *Oakley v. Monek*, 1865, 3 H. & C. at p. 714 ; also *Doe v. Samuel*, 1804, 5 Esp. 173, 174.

(*f*) Per Patteson, J., in *Hyatt v. Griffiths*, 1851, 17 Q. B. 509.

(*g*) *Richardson v. Gifford*, 1834, 1 A. & E. 52 ; *Arden v. Sullivan*, 1850, 14 Q. B. 832 ; *Buckworth v. Simpson*, 1835, 1 Cr. M. & R. 834 ; *Beale v. Sanders*, 1837, 3 Bing. N. C. 850 ; *Wyatt v. Cole*, 1877, 36 L. T. 613 ; *Ecclesiastical Commissioners v. Merrall*, 1869, L. R. 4 Ex. 162. And this may involve liability to rebuild after fire : *Digby v. Atkinson*, 1815, 4 Camp. 275. And see judgment in *Doe v. Amey*, 1840, 12 A. & E. at p. 479 ; and per Erle, J., in *Bowes v. Croll*, 1856, 6 E. & B. at p. 264.

(*h*) *Bennett v. Ireland*, 1858, E. B. & E. 326.

(*i*) *Sanders v. Karnell*, 1858, 1 F. & F. 356.

(*k*) *Hyatt v. Griffiths*, 1851, 17 Q. B. 505.

(*l*) *Brocklington v. Saunders*, 1864, 13 W. R. 46.

(*m*) *Boraston v. Green*, 1812, 16 East, 71. See *Hutton v. Warren*, 1836, 1 M. & W. 466.

(*n*) See *Roberts v. Barker*, 1833, 1 Cr. & M. 808.

(*o*) *Doe v. Amey*, 1840, 12 A. & E. 476.

for the cultivation of lands on any specified system (*p*) ; reservation of the rent payable in advance (*q*) ; provisoes for re-entry on non-payment of rent, or non-performance of covenants (*r*) ; or (in the case of a mining lease), that the tenancy may be determined by a six months' notice, expiring at any time (*s*) ; also a stipulation that the tenancy shall be determinable at a particular time (*t*) ; and a provision in a lease of nursery gardens that the lessor shall pay the lessee for all fruit trees and shrubs which shall have been planted by him, and shall be upon the demised premises at the determination of the lease (*u*).

Terms inconsistent with tenancy from year to year.

The following terms are inconsistent with a tenancy from year to year :—Covenants by tenant to build, or to do such substantial repairs as are not usually done by tenants from year to year (*x*) ; to paint once in three years (*y*), unless, indeed, he occupies for that time (*z*) ; to put premises in repair before he commences his occupation (*y*) ; a stipulation for two years' notice to quit (*a*) ; provision that the tenant shall not be disturbed, or his rent raised (*b*).

Apart from any question of a yearly tenancy, a lessee who has actually enjoyed for the full term cannot afterwards say that the covenants stipulated to be contained in the lease are not binding (*c*).

SECT. IV.—TENANCY FOR A TERM OF YEARS.

Distinguished from tenancy from year to year.

Tenancy for a term of years is distinguished from tenancy from year to year by certainty of duration ; by no notice being required to determine it ; and by its being always the result of express contract. There is no such thing known

(*p*) *Per Martin, B., in Tooker v. Smith, 1857, 1 H. & N. 736 ; Roe v. Ward, 1789, 1 H. Bl. 97, 99.*

(*q*) *Lee v. Smith, 1854, 9 Ex. 662 ; Finch v. Miller, 1848, 5 C. B. 428.*

(*r*) *Thomas v. Packer, 1857, 1 H. & N. 669 ; Doe v. Amey, 1840, 12 A. & E. 476 ; Crarley v. Price, 1875, L. R. 10 Q. B. 302.*

(*s*) *Bridges v. Potts, 1864, 17 C. B. N. S. 314.*

(*t*) *See per Maule, J., in Berrey v. Lindley, 1841, 3 M. & Gr. at p. 514.*

(*u*) *See per Willes, J., in Oakley v. Monck, 1866, L. R. 1 Ex. p. 164.*

(*x*) *See per Erle, J., in Bowes v. Croll, 1856, 6 E. & B. at p. 264.*

(*y*) *See judgments of Tindal, C.J., and Parke, J., in Pinero v. Judson, 1829, 6 Bing. at pp. 210, 211.*

(*z*) *Martin v. Smith, 1874, L. R. 9 Ex. 50.*

(*a*) *Tooker v. Smith, 1857, 1 H. & N. 732.*

(*b*) *See Kusel v. Watson, 1879, 11 C. D. p. 133.*

(*c*) *Pistor v. Cater, 1842, 9 M. & W. 315. See per Cave, J., in Adams v. Clutterbuck, 1883, 10 Q. B. D. p. 406.*

to the common law as a lease in perpetuity (*d*), though a lease for a term may contain a covenant for perpetual renewal (*e*). But provided some limit is placed on the duration of the lease it matters not how remote this limit may be.

Every contract sufficient to make a lease for years ought to have certainty in three limitations, viz., in the commencement of the term, in the continuance of it, and in the end of it; and these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land, and if any of these fail, it is not a good lease, for then there wants certainty (*f*).

Certainty
requisite.

The duration of a lease for years may, however, be made to depend upon a contingency, provided a fixed number of years is first specified, for which the lease is to last if not previously determined by the happening of the condition. Thus, a lease may be granted for twenty-one years if the tenant shall so long continue to occupy the premises (*g*), or for twenty years if the coverture between certain persons named shall so long continue (*h*); or for years dependent upon the duration of a life or lives (*i*); or for a term of years if the lessee shall so long live and continue in the lessor's service (*k*).

Lease for
years subject
to con-
tingency.

Leases may also be made for years determinable on the death of the lessee, or after six months' notice by his executors, or at the quarter-day next after his death (*l*).

Leases for years may be made determinable at specified periods, at the option of the lessor or lessee (*m*). A

Leases for
years deter-
minable at

(*d*) *Sevenoaks Ry. Co. v. L. C. & D. Ry. Co.*, 1879, 11 C. D. 625, 635.

(*e*) See *Pollock v. Booth*, 1875, Ir. R. 9 Eq. 229. A lease for ever at a rent, if made by deed in favour of the lessee and his heirs, is equivalent to a conveyance in fee subject to a rent-charge; if not made by deed, it becomes on payment of rent a tenancy from year to year: *Doe v. Gardiner*, 1852, 12 C. B. 319.

(*f*) See *Say v. Smith*, 1564, Plow. 272. See *infra*, Chap. III. sect. 2, p. 142, for construction of provisions as to commencement of leases; and Bac. Abr. (L. 3) 835.

(*g*) *Doe v. Clarke*, 1807, 8 East, 185. As to the construction of this condition, see *Doe v. Steward*, 1834, 1 A. & E. 300.

(*h*) Bac. Abr. (L. 3) 836.

(*i*) *Hughes and Crowther's Case*, 1610, 13 Rep. 66.

(*k*) *Wrenford v. Gyles*, 1599, Cro. Eliz. 643. In this case the majority of the Court held that the lease would not determine on the death of the lessor.

(*l*) See the agreement in *Nesham v. Selby*, 1872, 13 Eq. 191.

(*m*) See *Coltoun v. Lingham*, 1815, 1 Stark. 39; *Grey v. Friar*, 1854, 5 Ex. 584; 4 H. L. Cas. 565.

option of
lessee or
lessor.

Lease for
years, with
option to take
further term.

lease for three, six, or nine years is a lease for nine years, determinable at the end of three or six years (*u*).

Agreements capable of being enforced may also be made for granting leases for fixed terms of years and afterwards from year to year (*o*), or from year to year with an option for the lessee to take a lease for a term (*p*), or for a term with an option to take a lease for a further term (*q*). This option may, unless it is otherwise stipulated, be exercised by the tenant at any time during the continuance of the tenancy, though after the expiration of the term of years first specified (*q*), and it will pass to his trustee in bankruptcy (*r*.)

SECT. V.—TENANCY FOR LIFE.

Leases for life must be made by deed (*s*), and may be either for the life of the lessee or for the life or lives of some other person or persons, and in the latter case either for their joint lives or for the life of the survivor (*t*); also for the lives of the lessee himself and of some other person or persons, and this constitutes a single estate (*u*).

The estate taken by a tenant for life under a settlement must be distinguished from the estate of a lessee for life or lives holding merely under a lease at a rent. The former can, while his estate is in possession, exercise all the powers conferred by the S. L. A. 1882, while the latter cannot (*r*).

If one grant by deed lands or tenements, and express or limit no estate, the grantee has an estate for life (*u*); unless the whole deed taken together suggests a different construction (*y*).

Indefinite
grant.

(*u*) *Goodright v. Richardson*, 1789, 3 T. R. 462. See *Ferguson v. Cornish*, 1760, 2 Burr. 1032; 3 T. R. 463, note (*a*). As to the exercise of the option, see *infra*, Chap. VI., sect. I. (4).

(*o*) *Brown v. Trumper*, 1858, 26 Beav. 11; *Jones v. Nixon*, 1862, 1 H. & C. 48.

(*p*) See *Hersey v. Giblett*, 1854, 18 Beav. 174.

(*q*) *Moss v. Barton*, 1866, 1 Eq. 474.

(*r*) *Buckland v. Papillon*, 1866, 2 Ch. 67.

(*s*) *Browne v. Warner*, 1807, 14 Ves. 156, 158; *Doe v. Browne*, 1807, 8 East, 165; *Cheshire Lines Committee v. Lewis*, 1880, 50 L. J. Q. B. 121. See *Re King's Leasehold Estates*, 1873, L. R. 16 Eq. 521; and *infra*, p. 145.

(*t*) As to the construction of leases for lives, see *infra*, Chap. III., sect. 2, p. 144.

(*u*) Co. Litt. 41 b. See *Wright v. Cartwright*, 1757, 1 Burr. 282.

(*x*) Settled Land Act, 1882, s. 58 (1) (iv.); *supra*, p. 49.

(*y*) See judgment in *Doe v. Dodd*, 1838, 5 B. & Ad. pp. 692—694.

CHAPTER III.

THE CONTRACT OF TENANCY.

	PAGE
SECT. I. AGREEMENTS FOR LEASES	102
(1) Conclusion of contract	102
(2) Requisites for validity of contract	103
(i) Memorandum in writing	103
Essentials of memorandum	106
(ii) Part performance	108
(3) Rights of intended lessee	111
(4) Remedies for breach of agreement	113
Action for damages	113
Specific performance	113
(5) Stamps	116
SECT. II. LEASES	118
(1) Statutory requisites	118
In what cases leases may be made by parol	118
(2) In what cases extrinsic evidence is admissible	121
(3) Form and construction of lease	124
Date	125
Recitals	126
Consideration	126
Operative words	126
Parcels	126
Rule of " <i>falsa demonstratio</i> "	127
Meaning of terms	129
Mines and minerals	131
Easements	132
Fixtures	136
Exceptions and reservations	136
Habendum	140
Commencement of term	141
Duration of term	143
For years	143
From year to year	144
For life	144
Reddendum	146
Covenants	148
Usual covenants	150
Dependent or independent	155
Joint or several	156
Liability of assigns	157
Difficulty of performance	158
Illegality	158
Damages for breach	159
Option of purchase	159
" to determine lease	162
Covenant for renewal	162
Proviso for re-entry	163
Power to resume possession	169

	PAGE
SETC. II. LEASES— <i>continued</i> .	
(4) Stamps	170
(5) Counterparts and duplicates	176
Stamps	177
(6) Matters relating to the completion of leases	177
Execution	177
Delivery as escrow	178
Effect of non-execution by lessor	179
" alterations after execution	179
Registration	181
" under the Land Transfer Acts	182
Custody of lease	183
Costs	183
Remuneration Order	184
Entry of lessee	185
(7) Rectification of lease	187

SECT. I.—AGREEMENTS FOR LEASES.

(1) CONCLUSION OF CONTRACT.

Assent of
both parties.

IN order to constitute a valid agreement for a lease there must be an unequivocal assent (*a*) of the intending landlord and tenant to all the terms of the agreement (*b*). Hence, where an agreement is alleged to be contained in letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of any new or different term (*c*). There is no agreement while one side is entitled to object, and does object, to some of the terms (*d*). But where a draft lease is approved in writing on one side (*e*), subsequent alterations by the other side, which are not persisted in, do not prevent the conclusion of the contract (*f*). A letter signed by the defendant showing all the terms of the contract will suffice, since the bringing of the action is *primâ facie* an acceptance; but it is open to the defendant to prove that there was no acceptance by the plaintiff at the time (*g*). An offer may

(*a*) See *Clarke v. Fuller*, 1864, 16 C. B. N. S. 24; *Foster v. Rowland*, 1861, 7 H. & N. 103; *Nesham v. Selby*, 1872, 13 Eq. 191; aff. 7 Ch. 406.

(*b*) See *Crossley v. Maycock*, 1874, 18 Eq. 180; *Rossiter v. Miller*, 1878, 3 App. Cas. at p. 1151; *Donnison v. People's Café Co.*, Weekly Notes, 1881, p. 107; *Jones v. Daniel*, 1894, 2 Ch. 332; *Stanley v. Dowdeswell*, 1874, L. R. 10 C. P. 102; *Valle of Neath Colliery Co. v. Furness*, 1876, 45 L. J. Ch. 276; *Cayley v. Walpole*, 1870, 39 L. J. Ch. 609.

(*c*) *Holland v. Eyre*, 1825, 2 S. & S. 194. Cf. *Clive v. Beaumont*, 1847, 1 De G. & S. 397; *Lucas v. James*, 1849, 7 Hare, 410.

(*d*) *Wilcox v. Redhead*, 1880, 49 L. J. Ch. 539. See *Moritz v. Knowles*, 1899, 43 Sol. Journ. 529.

(*e*) *Caruleiro v. Puget*, 1865, 4 F. & F. 537.

(*f*) *Jolliffe v. Blumberg*, 1870, 18 W. R. 784.

(*g*) *Boys v. Ayherst*, 1822, 6 Madd. 316.

be withdrawn at any time before it is unequivocally accepted (*h*).

If there is in fact a concluded contract—that is, if all the essential terms of the lease are settled between the parties—the Court will enforce it, notwithstanding that it contains a provision that the terms shall be embodied in a formal agreement (*i*), or that the parties understand that a formal contract is to be signed (*k*). It has been held that a binding contract may be constituted, although there is a stipulation for “a proper lease to be drawn up and approved of” by one of the parties and his solicitor (*l*). If, however, the correspondence shows an agreement to take a lease of a house “subject to the preparation and approval of a formal contract,” it seems that there is usually no final agreement (*m*), though the use of these words is not conclusive (*n*).

Assent subject to formal contract

(2) REQUISITES FOR VALIDITY OF CONTRACT.

A contract to grant a lease, though complete, cannot be sued upon unless it has been (1) embodied in writing and signed by the party to be charged or his agent, or (2) partly performed.

(i) *Memorandum in Writing under the Statute of Frauds.*

Sect. 4 of the Statute of Frauds provides that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them (*o*), unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by

29 Car. 2, c. 3, s. 4.

Agreements for leases of lands, &c., or some memorandum thereof, must be in

(*h*) *Warner v. Willington*, 1856, 3 Drew. 523.

(*i*) *Chinnock v. Ely*, 1865, 4 D. J. & S. p. 646; *Rossiter v. Miller*, 1878, 3 App. Cas. 1124, 1138; *Ridgway v. Wharton*, 1857, 6 H. L. C. 238; *Crossley v. Maycock*, 1874, 18 Eq. p. 181; *Bolton Partners v. Lambert*, 1889, 41 C. D. 295; *Cook v. Williams*, 1897, 13 T. L. R. 481. See *North v. Percival*, *infra*. (*k*) *Filby v. Hounsel*, 1896, 2 Ch. 737.

(*l*) *Eadie v. Addison*, 1882, 31 W. R. 320. See *Chipperfield v. Carter*, 1895, 72 L. T. 487.

(*m*) *Winn v. Bull*, 1877, 7 C. D. 29; *Harvey v. Barnard's Inn*, 1881, 50 L. J. Ch. 750; *Honeyman v. Marryatt*, 1855, 21 Beav. 14; *Ball v. Bridges*, 1874, 22 W. R. 552; *Hawkesworth v. Chaffey*, 1886, 55 L. J. Ch. 335; *Page v. Norfolk*, 1894, 70 L. T. 23. As to waiver of the condition, see *Lloyd v. Nowell*, 1895, 2 Ch. 744.

(*n*) *North v. Percival*, 1898, 2 Ch. 128.

(*o*) That an agreement for a lease is a contract within this section, see judgment of Littledale, J., in *Evans v. Roberts*, 1826, 5 B. & C. at p. 839.

writing, and signed by the party to be charged therewith.

the party to be charged therewith, or some other person thereunto by him lawfully authorized.

This section does not render contracts void, still less illegal, but it renders the kind of evidence required indispensable when it is sought to enforce the contract (*p*). An agreement for the letting of furnished lodgings is an agreement relating to an interest in land within the section (*q*), but not an agreement for board and lodging which does not give the right to the exclusive use of any part of the house (*r*). An agreement for abatement of rent is within the section (*s*)—though it may be void for want of consideration (*t*)—and so is an agreement for a lease of an incorporeal right, such as a right of shooting, which confers an interest in land and is not a mere licence (*u*). Where the tenant enters under a parol agreement, but does not occupy for the whole of the term, he is nevertheless liable in an action for use and occupation for the rent for the entire term (*x*).

Agreement partly relating to land.

Where an agreement by parol relating to an interest in land, which ought to be in writing, is accompanied by another parol agreement which would not by itself require to be in writing, and the two form parts of one agreement, the whole must be in writing; as where upon an agreement for letting a house and furniture the lessor agrees to send in additional furniture (*y*), or where upon an agreement to let a house the lessor agrees to sell fixtures and to make improvements (*z*).

Parol variations.

So where there is a written agreement part of which relates to the letting of land, the whole is subject to the statute, and a parol variation of any part is inadmissible (*a*).

(*p*) An agreement may in equity be exempt from the statute on the ground of fraud. See note to *Pym v. Blackburn*, 1796, 3 Ves. p. 38; *Whitchurch v. Bevis*, 1789, 2 Bro. C. C. p. 565.

(*q*) *Inman v. Stamp*, 1815, 1 Stark. 12; *Edge v. Strafford*, 1831, 1 Cr. & J. 391. (*r*) *Wright v. Starert*, 1860, 2 E. & E. 721.

(*s*) *O'Connor v. Spaight*, 1804, 1 Sch. & Lef. 305.

(*t*) See *Fitzgerald v. Lord Portarlington*, 1835, 1 Jones' Ex. R. (Ir.) 431.

(*u*) *Webber v. Lee*, 1882, 9 Q. B. D. 315. As to enforcing a parol agreement for such a right on the ground of part performance, see *McManus v. Cooke*, 1887, 35 C. D. 681.

(*x*) *Smallwood v. Sheppards*, 1895, 2 Q. B. 627.

(*y*) *Mechelen v. Wallace*, 1837, 7 A. & E. 49.

(*z*) *Vaughan v. Hancock*, 1846, 3 C. B. 766. But such an agreement might now be held to be collateral to the agreement for letting; see *Angell v. Duke*, 1875, L. R. 10 Q. B., p. 178; *Erskine v. Adeane*, 1873, 8 Ch. 756; *infra*, p. 123. (*a*) *Harvey v. Graham*, 1836, 5 A. & E. 61.

And where there was a written agreement for a lease upon terms, and the lease was granted under a new agreement varying by parol from the written agreement, the new agreement was held not to be enforceable (*b*).

But a parol agreement which is purely collateral to the lease or agreement for a lease is enforceable, if not itself within the Statute of Frauds (*c*). Collateral agreement.

THE MEMORANDUM.

It is not necessary that the memorandum or note should be contemporaneous with the making of the agreement (*d*), but the agreement must be complete when the memorandum is made (*e*), and the memorandum must be made before the time when the action is brought (*f*). The memorandum.

Although the memorandum must contain more than a mere proposal for a tenancy (*g*), yet it need not have the character of a written contract between the parties, or be delivered to the person who is to have the remedy upon it (*h*). A note or letter written by the lessor to his agent, specifying the essential terms and containing directions to carry the agreement into execution, is sufficient to bind the lessor (*k*).

And the memorandum need not be contained in a single paper; the paper which is signed by the party to be charged may be taken in connection with another to which it clearly refers (*l*); and sometimes parol evidence has been admitted of circumstances connecting the two documents (*m*). Thus an envelope and a letter which is proved by parol evidence to have been inclosed in it can be taken together so that Several documents.

(*b*) *Sanderson v. Graves*, 1875, L. R. 10 Ex. 234. (*c*) *Infra*, p. 123.

(*d*) Per Lord Ellenborough, C.J., in *Shippey v. Derrison*, 1805, 5 Esp. p. 193.

(*e*) *Munday v. Asprey*, 1880, 13 C. D. 855.

(*f*) *Lucas v. Dixon*, 1889, 22 Q. B. D. 357.

(*g*) *Clarke v. Fuller*, 1864, 16 C. B. N. S. 24; *Forster v. Rowland*, 1861, 7 H. & N. 103. See *Doe v. Cartwright*, 1820, 3 B. & A. 326.

(*h*) See judgment of Willes, J., in *Gibson v. Holland*, 1865, L. R. 1 C. P. 1, p. 8.

(*k*) *Gibson v. Holland*, *supra*; Sugden, V. & P. (14th ed.) 139. See *Clerk v. Wright*, 1737, 1 Atk. 12; *Welford v. Beazely*, 1747, 3 Atk. 503.

(*l*) *Ridgway v. Wharton*, 1857, 6 H. L. C. 238. Cf. *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 22; *Potter v. Peters*, 1895, 72 L. T. 624; *Wylson v. Dunn*, 1887, 34 C. D. 569.

(*m*) *Oliver v. Hunting*, 1890, 44 C. D. 205; *Baumann v. James*, 1868, 3 Ch. 508; *Long v. Millar*, 1879, 4 C. P. D. 450.

the name of one of the parties may be supplied from the envelope (*n*). Where a note of the terms of a contract has to be made out from letters, the whole of the correspondence which has passed must be taken into account, and the Court will not stop at the first two letters, although appearing to form a complete contract, if it appears from subsequent letters that there were terms which were then, and which remained, unsettled (*o*). In deciding whether letters form a sufficient memorandum of a contract the principle already noticed must be borne in mind, that the terms offered by one party must in the result be unconditionally and unequivocally accepted by the other party (*p*).

Terms of the
memorandum.

The memorandum must either state all the essential terms of the contract (*q*) or refer to some document from which they may be ascertained (*r*). The terms so to be stated are (1) the subject-matter—describing with certainty the premises to be demised (*s*); (2) the commencement (*t*) and duration (*u*) of the term; (3) the amount of the fine (if any) or other consideration (*x*), and of the rent (*y*); and (4) the names of both the parties to the agreement (*z*), or at least a description by which they can be identified. The

(*n*) *Pearce v. Gardner*, 1897, 1 Q. B. 688.

(*o*) *Hussey v. Horne-Payne*, 1879, 4 App. Cas. 311; *Bristol, &c., Bread Co. v. Muggs*, 1890, 44 C. D. 616. See *Bolton Partners v. Lambert*, 1889, 41 C. D. 295, 306.

(*p*) *Supra*, p. 102.

(*q*) *Williams v. Lake*, 1859, 2 E. & E. 349, 354. See *Jackson v. Oglander*, 865, 2 Hem. & M. 465; *Baumann v. James*, 1868, 3 Ch. 508; *Clarke v. Fuller*, 1864, 16 C. B. N. S. 24.

(*r*) See *Cave v. Hastings*, 1881, 7 Q. B. D. 125; *Baumann v. James*.

(*s*) *Lancaster v. De Trafford*, 1862, 31 L. J. Ch. 554.

(*t*) *Blore v. Sutton*, 1817, 3 Mer. 237; *Clarke v. Fuller*, 1864, 16 C. B. N. S. 24; *Nesham v. Selby*, 1872, 7 Ch. 406; *Cartwright v. Miller*, 1877, 36 L. T. 398.

(*u*) *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 22; *Fitzmaurice v. Bayley*, 1857, 8 E. & B. 664; *Gordon v. Trevelyan*, 1814, 1 Price, 64; *Cox v. Middleton*, 1854, 2 Drew, 209; *Dolling v. Evans*, 1867, 36 L. J. Ch. 474. See *Kensington v. Phillips*, 1817, 5 Dow, 61. As to an agreement to let property so long as it remains in the lessor's hands, see *Edwardes' Menu Co. v. Chudleigh*, 1897, 14 T. L. R. 47, 64.

(*x*) *Wain v. Warlters*, 1804, 5 East, 10; *Saunders v. Wakefield*, 1821, 4 B. & A. 595.

(*y*) *Baumann v. James*, 1868, L. R. 3 Ch. 508.

(*z*) *Williams v. Lake*, 1859, 2 E. & E. 349. See judgment in *Warner v. Willington*, 1856, 3 Drew. p. 530; *Williams v. Jordan*, 1877, 6 C. D. 517; *Stokell v. Niven*, 1889, 61 L. T. 18. The insertion of the name of an agent for an undisclosed principal is sufficient: *Filby v. Hounsel*, 1896, 2 Ch. 737.

term "vendor" (a), or, it would seem, "lessor" is not a sufficient description, but "proprietor" or "mortgagee" is (b).

The premises to be demised need not be exactly described : The premises.
it is enough if they are so described as to be capable of identification by the aid of extrinsic evidence, including parol evidence (c).

The following descriptions in agreements for leases have been held to be sufficient when explained by parol evidence:—
"This place" (d) ; "the property in Cable Street" (e) ;
"Mr. Ogilvie's house" (f) ; "the mill property, including cottages in Esher Village" (g) ; "land at Forest Gate" (h).

In *Jacques v. Millar* (k) it was held that if there was nothing to show that the term was not to commence at the date of the agreement, that date might be presumed to be the commencement ; but this has been overruled (l), and the date of commencement must either be expressly fixed or there must be circumstances stated from which the commencement can be ascertained (m). Thus, if the rent is made payable from a certain date the term begins at that date (h), or if possession is to be given on payment of a sum of money the term is from the date of payment (o). And if the date has been agreed at the time of the contract it may be ascertained from subsequent correspondence (p).

Commence-
ment of the
term.

(a) *Potter v. Duffield*, 1874, 18 Eq. 4 ; *Coombs v. Wilks*, 1891, 3 Ch. 77.
(b) *Rossiter v. Miller*, 1878, 3 App. Cas. 1124 ; *Sale v. Lambert*, 1874, 18 Eq. 1 ; cf. *Jarrett v. Hunter*, 1886, 34 C. D. 182 ; *Pattle v. Anstruther*, 1893, 69 L. T. 175.

(c) *Ogilvie v. Foljambe*, 1817, 3 Mer. 53 ; *Shardlow v. Cotterell*, 1881, 20 C. D. 90 ; *Phant v. Bourne*, 1897, 2 Ch. 281. See *Shrubs v. Thimbleby & Son*, 1897, 13 T. L. R. 451, judgment of Chitty, L.J., p. 453. As to subsequent ascertainment of the premises, see *Jenkins v. Green* (No. 1), 1858, 27 Beav. 437, where an agreement for a lease of defined glebe land "except 37 acres" was good, since the choice of the part to be excepted lay with the lessee ; and *Huyprard v. Cope*, 1858, 25 Beav. 140, where the extent of specified seams of coal was left to be subsequently defined.

(d) *Waldron v. Jacob*, 1870, Ir. R. 5 Eq. 131.

(e) *Bleakley v. Smith*, 1840, 11 Sim. 150.

(f) *Ogilvie v. Foljambe*, 1817, 3 Mer. p. 61.

(g) *McMurray v. Spicer*, 1868, 5 Eq. 527.

(h) *Wesley v. Walker*, 1878, 26 W. R. 368. (k) 1877, 6 C. D. 153.

(l) *Marshall v. Berridge*, 1881, 19 C. D. 233. See *Rock Portland Cement Co. v. Wilson*, 1882, 52 L. J. Ch. 214 ; *Humphery v. Conybeare*, 1899, 80 L. T. 40.

(m) *Phelan v. Tedcastle*, 1885, 15 L. R. (Ir.) 169 ; *Re Lander and Bagley's Contract*, 1892, 3 Ch. 41. See *Verlander v. Cold*, 1823, T. & R. 352 ; *Wood v. Aylward*, 1887, 58 L. T. 662.

(o) *Erskine v. Armstrong*, 1887, 20 L. R. (Ir.) 296.

(p) *White v. Hay*, 1897, 72 L. T. 281.

Signature.

The Statute of Frauds is satisfied if the agreement is signed only by the party to be charged (*q*); and the signature need not be at the foot of the instrument. It must be introduced in such a manner as to authenticate the instrument (*r*), and for this purpose the insertion of the name in the body of the instrument may be effectual, as where the party writes in his own hand "Mr. A. B. has agreed," &c. (*s*). But there must be a signature of the name; a description by which the writer could be identified is not enough (*t*). Where all the partners in a firm have acted in the firm's business, signature in the name of the firm is sufficient, although there is no evidence as to who signed (*u*).

By agent.

An agent to contract for the letting of land under the Statute of Frauds need not be authorized in writing (*x*); but he must be appointed for the special purpose of contracting; and where a solicitor, authorized to prepare a draft contract, forwarded the draft to the other side with a note referring to the sale, it was held that the statute was not satisfied (*y*). Signature by the agent's clerk is not sufficient (*z*). A resolution of a board of directors of a company, signed by the chairman, and adopting a draft agreement, satisfies the statute (*a*). An entry by a steward in his employer's contract book is not sufficient (*aa*).

Escrow.

An agreement may, like a deed, be made as an escrow, and although the lessor has signed it he will not be bound if a condition, upon which the entering into the agreement is dependent, is not fulfilled (*b*).

(ii) *Part Performance.*

Parol agreement.

Specific performance will be enforced (*c*) of parol agree-

(*q*) *Seton v. Slade*, 1802, 7 Ves. 265; *Fowle v. Freeman*, 1804, 9 Ves. 351; *Laythoarp v. Bryant*, 1836, 2 Bing. N. C. 735.

(*r*) *Ogilvie v. Foljambe*, 1817, 3 Mer. 53.

(*s*) *Probert v. Parker*, 1830, 1 Russ. & M. 625; *Bleakley v. Smith*, 1840, 11 Sim. 150. Cf. *Stokes v. Moore*, 1786, 1 Cox, 219.

(*t*) *Selby v. Selby*, 1817, 3 Mer. 2.

(*u*) *Evans v. Curtis*, 1826, 2 C. & P. 296.

(*x*) *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 22; *Heard v. Pilley*, 1869, 4 Ch. 548. Cf. as to authority of auctioneer: *Emmerson v. Heelis*, 1809, 2 Taunt. p. 48. (*y*) *Smith v. Webster*, 1876, 3 C. D. 49.

(*z*) *Potter v. Peters*, 1895, 72 L. T. 624.

(*a*) *Jones v. Victoria Graving Dock Co.*, 1877, 2 Q. B. D. 314.

(*aa*) *Charlewood v. Duke of Bedford*, 1738, 1 Atk. 497.

(*b*) *Pattle v. Hornilbrook*, 1897, 1 Ch. 25.

(*c*) County Courts have jurisdiction to enforce performance where

ments for leases of any interest in land when such agreements have been partly performed (*d*), provided the following requisites exist:—(i.) The agreement must be certain and definite in its terms (*e*), complete (*f*), and final (*g*); in fact, such a contract that, if it had been in writing, the Court would have had jurisdiction to enforce it specifically (*h*). (ii.) It must be made by a person having power to grant the lease (*i*). A parol agreement by a tenant for life with power of leasing will not be enforced against the remainderman on the ground of part performance (*k*). (iii.) It must either be admitted or be clearly proved (*l*).

The Court is bound to consider, first, whether there has been a parol agreement; and secondly, if so, whether there has been part performance of it: and then, if there has been part performance, it is the duty of the Court to act upon the established principle, and to decree performance of the contract (*m*).

To operate as a part performance an act must have been done unequivocally referring to, and resulting from, the agreement (*n*); of such a nature, indeed, that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted to show what the agreement

Acts of part performance.

the value of the property does not exceed 500*l.*: County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67 (4).

(*d*) *Lester v. Foxcroft*, 1700, Coll. P. C. 108. See notes in 2 Wh. & Tud. L. C. 460 (7th ed.). (*e*) *Cooth v. Jackson*, 1861, 6 Ves. p. 38.

(*f*) See *Thyne v. Glengall*, 1848, 2 H. L. Cas. 131, 158; *Richards v. North London Ry. Co.*, 1871, 20 W. R. 194; *Bretel v. Neveu*, 1878, 39 L. T. 257; *Fuulkner v. Llewellyn*, 1862, 31 L. J. Ch. 549; *Price v. Salisbury*, 1863, 32 Beav. p. 459; *Phillips v. Alderton*, 1875, 24 W. R. 8.

(*g*) *Supra*, p. 102. (*h*) See Fry on Specific Performance, 3rd ed. p. 275.

(*i*) See *Phillips v. Edwards*, 1864, 33 Beav. 440.

(*k*) *Trotman v. Flesher*, 1861, 3 Giff. 1; *supra*, p. 56.

(*l*) *Mortal v. Lyons*, 1858, 8 Ir. Ch. Rep. 112. See *Pilling v. Armitage*, 1806, 12 Ves. 78; *Reynolds v. Waring*, 1831, 1 Yo. 346; *Morphett v. Jones*, 1818, 1 Swanst. 172. If a parol agreement is admitted by the defendant, and he does not insist on the statute, the Court will decree specific performance: *Gunter v. Halsey*, 1739, 2 Amb. 586.

(*m*) Per Lord Cranworth, L.C., in *Nunn v. Fabian*, 1865, 1 Ch. 35. The doctrine of part performance is not confined to questions relating to land: *Maddison v. Alderson*, 1883, 8 App. Cas. p. 474; *McManus v. Cooke*, 1887, 35 C. D. pp. 690, 691. Cf. *Britain v. Rossiter*, 1879, 11 Q. B. D. 123; Fry on Spec. Pref. 3rd ed. p. 276.

(*n*) *Ex parte Hooper*, 1815, 19 Ves. p. 479; *Morphett v. Jones*, 1818, 1 Swanst. p. 181; *Alderson v. Maddison*, 1881, 7 Q. B. D. p. 178 (aff. 8 App. Cas. 467).

is (o). The following circumstances have been held to amount to part performance :—

1. Entry into possession and expenditure.

Where under a parol agreement for a lease, and with distinct reference to such agreement, a person has entered into possession of premises (*p*) ; and especially where, in pursuance of the agreement, he has expended money in improvements (*q*), with the acquiescence of the landlord (*r*.)

2. Payment of rent at increased rate.

Where under a parol agreement by a landlord to grant to a tenant in possession a lease for a term of years at an increased rent, the tenant has paid rent at the increased rate (*s*).

3. Expenditure in pursuance of parol agreement.

Where a person who is already in possession of premises as tenant expends money in alterations in pursuance of a parol agreement for a new lease (*t*), the alterations being such as he would not have been liable to make if there had been no agreement (*u*). And it is the same if the expenditure is made by a sublessee of the tenant with his knowledge and approval (*x*). But the making of alterations by the intended landlord is not a sufficient part performance to take the case out of the statute (*y*).

4. Under special circumstances, mere retention of possession.

Ordinarily the retention of possession by a tenant is not in itself a sufficient part performance of a parol agreement (*z*) ; but under special circumstances it may have this

(o) Per Grant, M.R., in *Frame v. Dawson*, 1807, 14 Ves. p. 387.

(p) *Morphett v. Jones*, 1818, 1 Swanst. 172 ; *Pain v. Coombs*, 1857, 1 De G. & J. 34. See *Whitbread v. Brockhurst*, 1784, 1 Br. C. C. p. 409, and *Cole v. White*, there cited ; *Wills v. Stradling*, 1797, 3 Ves. p. 381 ; *Boardman v. Mostyn*, 1801, 6 Ves. p. 470 ; *Kine v. Balfie*, 1813, 2 Ball & B. 343, 348 ; *Wilson v. W. Hartlepool Ry. Co.*, 1864, 2 D. J. & S. p. 485. Cf. *Tofield v. Roberts*, 1894, 10 T. L. R. 437.

(q) *Gregory v. Mighell*, 1811, 18 Ves. 328 ; *Mundy v. Jolliffe*, 1839, 5 My. & C. 167 ; *Farrall v. Davenport*, 1861, 3 Giff. 363 ; *Reddin v. Jarman*, 1867, 16 L. T. 449. See *Surcome v. Pinniger*, 1853, 3 D. M. & G. 571 ; *Shillibeer v. Jarvis*, 1856, 8 D. M. & G. 79 ; *Phillips v. Alderton*, 1875, 24 W. R. 8.

(r) See *Dann v. Spurrier*, 1802, 7 Ves. p. 236 ; *Ramsden v. Dyson*, 1866, L. R. 1 H. L. 129 ; *Plimmer v. Mayor, &c. of Wellington*, 1884, 9 App. Cas. 699 ; *Civil Service Assoc. v. Whiteman*, 1899, 68 L. J. Ch. 484.

(s) *Nunn v. Fabian*, 1865, 1 Ch. 35 ; *Williams v. Evans*, 1875, 19 Eq. p. 557 ; *Connor v. Fitzgerald*, 1883, 11 L. R. (Ir.) 106 ; *Humphreys v. Green*, 1882, 10 Q. B. D. 148, 156 ; *Miller v. Aldworth*, 1899, 1 Ch. 622 ; but see per Brett, L.J., in *Humphreys v. Green*, at p. 160. See *Wills v. Stradling*, 1797, 3 Ves. 378, 382.

(t) *Sutherland v. Briggs*, 1841, 1 Hare, 26. See *Wills v. Stradling*, *supra*.

(u) See *Frame v. Dawson*, 1807, 14 Ves. 386.

(x) *Williams v. Evans*, 1875, 19 Eq. 547.

(y) *Whittick v. Mozley*, 1883, C. & E. 86.

(z) *Wills v. Stradling*, 1797, 3 Ves. pp. 381, 382 ; *Brennan v. Bolton*, 1842, 2 Dr. & War. 349 ; per Baggallay, L.J., in *Alderson v. Maddison*,

effect, as where it is referable only to a contract for renewal (*a*), or where, possession having been taken before a parol contract for a lease, the continuance of possession after the contract is unequivocally referable to the contract (*b*).

(3) RIGHTS OF INTENDED LESSEE.

By agreeing to grant a lease the intended lessor impliedly undertakes that he has title to grant it; and if he has not such title at the time when the lease ought to be granted (*c*), he is liable to an action at the suit of the intended lessee (*d*). A lessee is a purchaser *pro tanto*, and, apart from statutory restriction, is entitled to call upon the lessor for an inspection of his title (*e*).

Right to production of lessor's title.

It is provided, however, by the Vendor and Purchaser Act, 1874 (*f*), that under a contract to grant a term of years, whether to be derived out of a freehold or leasehold estate, the intended lessee shall not be entitled to call for the title to the freehold (*g*). But this rule is subject to any stipulation to the contrary contained in the contract (*g*). And by the Conveyancing Act, 1881 (*h*), on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee has not the right to call for the title to that reversion (*i*). This provision applies only if and as far as a contrary intention is not expressed in the contract, and it has effect subject to the terms of the contract (*k*).

Statutory restrictions on right.

1881, 7 Q. B. D. p. 178; *Re National Savings Bank Association, Brady's Case*, 1867, 15 W. R. 753.

(*a*) *Dowell v. Dew*, 1842, 1 Y. & C. C. C. 345.

(*b*) *Hodson v. Heuland*, 1896, 2 Ch. 428. See *White v. Whitewood*, 1897, 13 T. L. R. 409.

(*c*) *De Medina v. Norman*, 1842, 9 M. & W. 820. Cf. *Reeves v. Gill*, 1838, 1 Beav. 375.

(*d*) *Stranks v. St. John*, 1867, L. R. 2 C. P. 376; *Hoare v. Chambers*, 1895, 11 T. L. R. 185; *Roper v. Coombes*, 1827, 6 B. & C. 534; *Gwillim v. Stone*, 1811, 3 Taunt. 433 (the marginal note to this case is incorrect); explained in *Stranks v. St. John*, *loc. cit.* p. 379. See *Temple v. Brown*, 1815, 6 Taunt. 60; *Fiedler v. Hooker*, 1817, 2 Mer. p. 427; and as to an agreement for an underlease, see *Jackson v. Corbin*, 1841, 8 M. & W. 790.

(*e*) Sug. V. & P. (14th ed.) 367, note; *Keech v. Hull*, 1778, 1 Dougl. 21; *Purris v. Rayer*, 1821, 9 Price, 488. (*f*) 37 & 38 Vict. c. 78.

(*g*) Sect. 2. See *Jones v. Watts*, 1890, 43 C. D. 574. This and the following rule apply to a lease of a right of way: *S. C.*

(*h*) 44 & 45 Vict. c. 41.

(*i*) Sect. 13 (1). *I.e.* the reversion to the lease out of which the sub-lease is to be granted: *Gosling v. Woolf*, 1893, 1 Q. B. p. 40.

(*k*) Sect. 13 (2).

The result of these two enactments is that, subject to stipulation to the contrary, the intending lessee can in no case call for the title to the freehold, and, if he is about to take a lease from an intending lessor who himself holds by underlease, he cannot call for the title to the headlease; but an intending lessor, who holds by lease, whether original or derivative, must show his own lease and deduce the title thereto. These rules do not prevent the lessee from having constructive notice of his lessor's title, and in this respect he is in the same position as he would have been in before the Act, had he stipulated not to inquire into the title (*l*). He is not assisted by sect. 3 of the Conveyancing Act, 1882 (*m*). Hence, where it is important to see the lessor's title, the above rules must be expressly or impliedly excluded. The rule as to calling for the title to the freehold is excluded by an agreement by the freeholder to deliver an abstract of his title to the intending lessee (*n*).

Covenants.

If an agreement for a lease contains no stipulations as to covenants, the person agreeing to take the lease has a right to a lease containing only usual covenants (*o*).

Underlease.

Upon an agreement for an underlease it is the duty of the underlessee to examine the headlease and see that the proposed sub-term can be validly granted. If the sub-term agreed for exceeds the length of the residue of the head-term, the underlessee cannot, after the underlease has been actually granted, recover compensation (*p*), except by virtue of an express compensation clause (*q*). A sublessor who has covenanted to do his utmost to procure a renewal of his own lease, must pay any reasonable sum which is exacted as a condition of renewal, or he will commit a breach of the covenant (*r*).

Where a lessee who is prohibited from subletting without consent agrees to underlet, the underlessee can repudiate

(*l*) *Patman v. Harland*, 1881, 17 C. D. 353, 358; *Mogridge v. Clapp*, 1892, 3 Ch. 382, 397.

(*m*) 45 & 46 Vict. c. 39.

(*n*) *Re Pursell and Deakin's Contract*, W. N. 1893, 152.

(*o*) *Propert v. Parker*, 1832, 3 My. & K. 280. As to what covenants are "usual," see *infra*, p. 150.

(*p*) *Besley v. Besley*, 1878, 9 C. D. 103; *Clayton v. Lecch*, 1889, 41 C. D. 103.

(*q*) *Palmer v. Johnson*, 1884, 13 Q. B. D. 351.

(*r*) *Simpson v. Clayton*, 1838, 4 Bing. N. C. 758.

at once, and is not bound to wait and see if the consent of the lessor can be obtained ; unless, indeed, at the time of repudiation the necessary consent has been already obtained (s).

(4) REMEDIES FOR BREACH OF AGREEMENT.

Where a person who has contracted to grant a lease fails to carry out his contract in consequence of a defect in his title he is not liable for damages consequential on the intending lessee's loss of his contract, even though the defect was known to the lessor at the time when he entered into the contract (t). The rule in this respect applicable to sales of real estate applies also to leases (u). If, however, the intending lessor can grant the lease either by force of his own title, or by force of the interest of others whom he can compel to join in the lease, and wilfully fails to carry out his contract, he is liable to an action for damages (x). And in any case the intending lessee can recover back a sum he may have paid as premium (y), or in repairing the premises (z), and the costs to which he has been put (although not yet actually paid (a)) in investigating the title and otherwise preparatory to the grant of the lease (b).

1. Action for damages.

An intending lessor, who by his own conduct has debarred himself from granting a lease at an agreed future day, is considered as having committed a breach of his agreement, and is liable to be sued before such day arrives (c).

Instead of bringing an action for damages (d) the person

2. Specific performance.

(s) *Forrer v. Nash*, 1865, 35 Beav. 167. And as to agreements for underleases, see *infra*, p. 388.

(t) *Bain v. Fothergill*, 1874, L. R. 7 H. L. 158, affirming *Flureau v. Thornhill*, 1776, 2 W. Bl. 1078, and overruling *Hopkins v. Grazebrook*, 1826, 6 B. & C. 31, and, apparently, *Robinson v. Harman*, 1848, 1 Ex. 850. See article in 27 Sol. Journ. 742.

(u) *Gas Light and Coke Co. v. Towse*, 1887, 35 C. D. p. 543 ; *Hyam v. Terry*, 1881, 25 Sol. Journ. 371.

(x) *Ward v. Smith*, 1822, 11 Price, 19 ; *Jaques v. Millar*, 1877, 6 C. D. 153. Ordinarily, if an agreement is too uncertain for specific performance, it is too uncertain to give rise to a claim for damages : *Wood v. Silcock*, 1884, 50 L. T. 251 ; but see *Foster v. Wheeler*, 1888, 38 C. D. 130.

(y) See *Wright v. Colls*, 1849, 8 C. B. 150.

(z) *Pulbrook v. Lawes*, 1876, 1 Q. B. D. 284 ; although there is no sufficient agreement in writing : *Ib.*

(a) *Richardson v. Chasen*, 1847, 10 Q. B. 756.

(b) *Hanslip v. Padwick*, 1850, 5 Ex. 615. See Dart's V. & P. 6th ed. II. 1076. As to action by intending lessor, see *Collins v. Willmott*, 1864, 11 L. T. 340.

(c) *Ford v. Tiley*, 1827, 6 B. & C. 325, 327.

(d) But not in addition to that remedy. See *Sainter v. Ferguson*, 1849, 1 Mac. & G. 286 ; *Orme v. Broughton*, 1834, 10 Bing. p. 538.

aggrieved by a breach of an agreement for a lease for years or life may obtain specific performance, provided the agreement is either evidenced by a memorandum duly made in writing under the Statute of Frauds (*e*), or has been partly performed (*f*), and provided further that it is complete (*g*), that it is certain (*h*) as to its substantial parts (*i*) and also that it is fair and just throughout (*k*). But the exercise of this jurisdiction is entirely in the discretion of the Court (*k*), and it will not in general decree specific performance of a contract for a yearly tenancy (*l*), or of an agreement for a term, though longer than a year, which has already expired by effluxion of time (*m*), or where there is evidence of insolvency, showing that the plaintiff is not in a position to perform the covenants contained in the lease (*n*). A mistake as to the legal effect of an agreement is no bar to specific performance (*o*). An agreement which is subject to a condition precedent will not be enforced till the condition is fulfilled (*p*). Where the condition involves the execution of repairs by the lessor, the lessee can resist specific performance on the ground of their non-execution, notwithstanding that he has taken possession (*q*), unless the delay amounts to acquiescence (*q*).

(*e*) *Supra*, p. 103.

(*f*) *Supra*, p. 108.

(*g*) See *Thynne v. Glengall*, 1848, 2 H. L. C. 131, 158.

(*h*) See *Price v. Griffith*, 1851, 1 D. M. & G. 80; *Powell v. Lovegrove*, 1856, 8 D. M. & G. 357; *Jeffery v. Stephens*, 1860, 8 W. R. 427; *Oxford v. Provand*, 1868, L. R. 2 P. C. 136; *Mayor of Oxford v. Crow*, 1893, 69 L. T. 228.

(*i*) *Parker v. Taswell*, 1858, 2 De G. & J. 559.

(*k*) Per Lord Hardwicke, C., in *Buxton v. Lister*, 1746, 3 Atk. p. 386. Where the intending lessor is entitled to only part of the property, specific performance may be ordered with an abatement of rent: *Burrow v. Scummell*, 1881, 19 C. D. 175; *McKenzie v. Hesketh*, 1877, 7 C. D. 675. A building agreement can be enforced separately as the various plots are built on: *Wilkinson v. Clements*, 1872, 8 Ch. 96; *Lowther v. Heaver*, 1889, 41 C. D. 248.

(*l*) *Clayton v. Illingworth*, 1853, 10 Hare, 451.

(*m*) See *Walters v. Northern Coal Mining Co.*, 1855, 5 D. M. & G. 629, 638; *De Brassac v. Martyn*, 1863, 11 W. R. 1020.

(*n*) *Neale v. Mackenzie*, 1837, 1 Keen, 474, 485. As to antedating a lease made under a judgment for specific performance, see *McIlroy v. Traill*, 1898, 1 I. R. 459.

(*o*) *Powell v. Smith*, 1872, 14 Eq. 85.

(*p*) *Abbot v. Blair*, 1860, 8 W. R. 672; *Modlen v. Snowball*, 1861, 4 D. F. & J. 143; *Williams v. Brisco*, 1882, 22 C. D. 441.

(*q*) *Lamare v. Dixon*, 1873, L. R. 6 H. L. 414. As to the effect of delay see *Nash v. Cochrane*, 1839, 3 Jur. 973; *Powis v. Lord Dynevor*, 1877, 35 L. T. 940; *Shepherd v. Walker*, 1875, 20 Eq. 659; *Huxham v. Llewellyn*, 1873, 21 W. R. 570, 766.

Where an intending lessee agreed to take a lease of a house if the house was put into thorough repair and the drawing rooms "handsomely decorated according to the present style," it was held that the agreement was too uncertain for specific performance to be ordered (r); but the decision appears to be exceptional, and an agreement under which the lessor is to put the house in decorative repair (s), or under which the lessee is "to do all painting, papering, repairing, decorating, &c., during the term" (t), has been specifically enforced, with an inquiry in the former case whether the agreement as to repair had been performed (s). It is sufficient if the agreement is substantially certain. Where the lessee agreed to do certain specified works and "other works," the whole estimated to cost from 150*l.* to 200*l.*, and the specified works would evidently nearly cost that sum, the reference to "other works" did not create uncertainty (u). The Court will not order performance of a preliminary building agreement in which the details of the buildings are not defined (v).

Specific performance will not be granted of an agreement which will involve great hardship to either of the parties to it. Hence specific performance has been refused of an agreement to take a lease of a new house which the owner agreed to finish, but which was so defectively finished that it was likely to subject the tenant to an unreasonably large annual outlay in order to fulfil the provisions of the covenant to repair (y); but otherwise where the tenant voluntarily takes the house in a bad state of repair (z). If a forfeiture will result from a grant of the lease, the Court will not order specific performance, but will give the lessee compensation (a). The mere possibility, however, that a forfeiture will ensue is not enough (b).

(r) *Taylor v. Portington*, 1855, 7 D. M. & G. 328.

(s) *Samuda v. Lurford*, 1862, 4 Giff. 42.

(t) *Dear v. Verity*, 1869, 38 L. J. Ch. 297, aff. p. 486.

(u) *Baumann v. James*, 1868, 3 Ch. 508.

(x) *Wood v. Silcock*, 1884, 50 L. T. 251.

(y) *Tildesley v. Clarkson*, 1862, 30 Beav. 419.

(z) *Cook v. Wagh*, 1860, 2 Giff. 201.

(a) See *Peacock v. Penson*, 1848, 11 Beav. 355. As to an agreement by a copyholder to grant leases for a longer period than is authorized by custom, see *Paxton v. Newton*, 1854, 2 Sm. & Giff. 437, 440.

(b) See Fry on Specific Performance, 3rd ed. p. 200. *Helling v. Lumley*, 1858, 3 De G. & J. 493.

Parol
variation.

A parol agreement, explaining, but not contradicting, the written agreement, may be used as a defence to specific performance (*bb*).

Specific
performance
not ordered.

Specific performance will not be ordered against an infant (*c*), or against a bankrupt (*d*); but it will be enforced against executors, provided this can be done without imposing upon them personal liability (*e*). Sometimes specific performance will be compelled indirectly by means of an injunction to prevent interference with a right under the agreement (*f*).

Damages in
lien of or in
addition to
specific
performance.

Under 21 & 22 Vict. c. 27, s. 2, where a plaintiff had made out a case for specific performance, the Court was empowered to give damages either in addition to or in substitution for specific performance (*g*). The Act has been repealed (*h*), but the jurisdiction conferred by it is preserved (*i*). Apart, however, from this special jurisdiction the High Court has under the Judicature Act, 1873 (*k*), power to give all such remedies as any of the parties may be entitled to, and it may consequently award damages under this general power, even though no case for specific performance has been made out (*l*). These damages will be for breach of the contract as though the action had been for damages in the first instance (*m*).

(5) STAMPS.

Where
necessary

A written offer to let, assented to verbally, is admissible in evidence without being stamped (*n*). But where an oral proposal is accepted in writing, such written acceptance

(*bb*) *Williams v. Jones*, 1888, 36 W. R. 573.

(*c*) *Lumley v. Ravenscroft*, 1895, 43 W. R. 584.

(*d*) Fry on Specific Performance, 3rd ed. pp. 438; and as to trustee in bankruptcy, see *ibid.*, p. 439.

(*e*) *Phillips v. Everard*, 1831, 5 Sim. 102; *Stephens v. Hotham*, 1855, 1 K. & J. 571. Cf. *Page v. Broom*, 1840, 3 Beav. 36.

(*f*) *Frogley v. E. of Lorelace*, 1859, Johns. 333.

(*g*) *Lewers v. E. of Shaftesbury*, 1866, 2 Eq. 270; *Lacey v. Pursell*, 1888, 39 C. D. p. 519. See *Proctor v. Bayley*, 1889, 42 C. D. 390; and as to lien of lessee for expenses and costs, see *Middleton v. Magway*, 1864, 2 Hem. & M. 233.

(*h*) Stat. Law Rev. Act, 1883 (46 & 47 Vict. c. 49).

(*i*) *Sayers v. Collier*, 1884, 28 C. D. 103.

(*k*) See sect. 24 (7).

(*l*) *Elmore v. Pirie*, 1887, 57 L. T. 333; *Tumplin v. James*, 1880, 15 C. D. p. 222.

(*m*) See *Rock Portland Cement Co. v. Wilson*, 1882, 52 L. J. Ch. 214; *Re Northumberland Avenue Hotel Co.*, 1885, 54 L. T. 76.

(*n*) *Edgar v. Blick*, 1816, 1 Stark. 464; *Drant v. Brown*, 1825, 3 B. & C. 665; *Luigg v. Smith*, 1862, 3 F. & F. 97. See *Turner v. Power* 1828, 7 B. & C. p. 626.

must be stamped (*o*). A mere proposal can be given in evidence without a stamp (*p*). Minutes of the terms of letting, signed by an auctioneer, must be stamped (*q*) ; but, if not signed, it seems they may be given in evidence without a stamp (*r*). Signature, however, is not necessary to bring a document within the phrase in the Stamp Act “under hand only,” and an agreement approved by the solicitors to the parties but not signed, which has been treated as an agreement, has been held not to be admissible in evidence without a stamp (*s*). Where an agreement embodies the terms of an abandoned lease, it is sufficient if the agreement only is stamped (*t*), but otherwise where the incorporated lease has been operative (*u*). Where there is an agreement in writing, it must be given in evidence ; the lessor cannot sue for use and occupation generally (*r*). If an unstamped agreement has been lost parol evidence cannot be given of its contents (*y*).

An agreement for a lease, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years or for any indefinite term, is to be charged with the same duty as if it were an actual lease made for the term and consideration mentioned in the agreement (*a*).

A lease made subsequently to, and in conformity with such an agreement duly stamped, is to be charged with the duty of sixpence only. This must be done by means of a “duty-paid denoting stamp” under sect. 11, the agreement, stamped with the *ad valorem* lease duty, being at the same time produced for inspection.

An agreement to take a lease signed only by the lessee requires no more than a sixpenny stamp (*b*).

Amount of duty.
Stamp Act.
1891 (*z*), s. 75.
Agreements for leases of lands, &c., not exceeding thirty-five years, to be charged as leases.

Agreement to take lease.

(*o*) *Hegarty v. Milne*, 1854, 14 C. B. 627.

(*p*) *Hawkins v. Warre*, 1825, 3 B. & C. 690.

(*q*) *Ramsbottom v. Mortley*, 1814, 2 M. & S. 445.

(*r*) *Ramsbottom v. Tunbridge*, 1814, 2 M. & S. 434.

(*s*) *Chadwick v. Clarke*, 1845, 1 C. B. 700. But see *Doe v. Pedigriph*, 1830, 4 C. & P. 312 ; *Doe v. Cartwright*, 1820, 3 B. & A. 326.

(*t*) *Pearce v. Cheslyn*, 1835, 4 A. & E. 225.

(*u*) *Turner v. Power*, 1828, 7 B. & C. 625.

(*v*) *Brewer v. Palmer*, 1800, 3 Esp. 213.

(*y*) *Smith v. Henley*, 1844, 1 Ph. 391. See *R. v. Castle Morton*, 1820, 3 B. & A. 588.

(*z*) 54 & 55 Vict. c. 39.

(*a*) *Infra*, p. 171.

(*b*) *Doe v. Wiggins*, 1843, 4 Q. B. 367 ; *Glen v. Dungey*, 1849, 4 Ex. 61.

Counterpart.

Where there is a counterpart of the agreement, the part signed by the lessor will bear the *ad valorem* stamp, and the counterpart either the same stamp or five shillings, whichever is the less, and the counterpart does not require a denoting stamp (*d*).

SECT. II.—LEASES.

(1) STATUTORY REQUISITES.

29 Car. 2, c. 3,
s. 1.

Parol leases
to be leases at
will only.

Sect. 2.

Except leases
not exceeding
three years,
and reserving
rent
amounting to
two-thirds
of improved
value.

8 & 9 Vict. c.
106 (*dd*), s. 3.
Leases to be
by deed.

1. Leases of
land, &c., to
end within
three years,
and reserving
rent equal to
two-thirds of
full value.

Computation
of the three
years.

Leases of any messuages, manors, lands, tenements or hereditaments made by parol, and not put in writing and signed by the parties making the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases at will only; except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parrs at the least of the full improved value of the thing demised.

A lease, required by law to be in writing, of any tenements or hereditaments, made after the first day of October, 1845, shall be void at law, unless made by deed. Signature is not essential to a lease by deed, such a lease not being within the Statute of Frauds (*e*).

The practical effect of these statutory provisions, and of the decisions upon them, may be stated as follows:—

Leases of land, and other corporeal hereditaments, for a term not exceeding three years from the time of making, and whereby there is reserved to the landlord a rent equal to two-third parts at least of the full improved value of the demised premises, may be made verbally (*f*), or by writing not under seal.

The first section of the Statute of Frauds applies only where the tenancy, if good, must of necessity last for more than three years; if at the time of the agreement the tenancy may last for less than three years, it is within the

(*d*) Sect. 72. (*dd*) The Real Property Act, 1845.

(*e*) *Aveline v. Whisson*, 1842, 4 M. & Gr. 801; *Cherry v. Heming*, 1849, 4 Ex. 631.

(*f*) But verbal leases do not confer the right to sue the lessee for damages for not taking possession. See *Edge v. Stafford*, 1831, 1 Cr. & J. 391, p. 397.

exception of sect. 2 (*g*). So also is an agreement which operates as an actual demise for less than three years, although coupled with an agreement or an option for a further term (*h*). The contract is divisible, and the actual demise being within the exception in sect. 2 of the Statute of Frauds will be valid (*i*). The exception is not restricted to leases commencing from the day of making (*k*); it is sufficient that they expire within three years computed from the date of the agreement (*l*).

Any words will make a parol lease which sufficiently express the intent. "You shall have a lease of my lands in D. for twenty-one years, paying therefore ten shillings per annum; make a lease in writing and I will seal it," was good before the statute, though no writing made (*m*). Parol lease.

Leases of land, and other corporeal hereditaments for a term which will not expire till more than three years from the day of making, or reserving less rent than two-thirds parts of the full improved value of the demised premises, must be made by deed. But an instrument not under seal purporting to demise land or other corporeal hereditaments for a longer term than three years, or reserving a rent not amounting to two-thirds of the full improved value, though void *as a lease*, will, if containing the requisites of a valid agreement (*n*), be construed as an agreement for a lease (*o*), of which specific performance may be enforced (*p*).

2. Leases of land, &c., for more than three years or reserving less rent than two-thirds of full value.

It was formerly considered that if the lessee had entered and paid rent under an instrument of this nature, a tenancy from year to year might be created (*q*); and that the instrument might indicate the terms of such tenancy (*q*).

(*g*) *Ex parte Voisey*, 1882, 21 Ch. D. 442, p. 458.

(*h*) *Rollason v. Leon*, 1861, 7 H. & N. 73; *Hand v. Hall*, 1877, 2 Ex. D. 355.

(*i*) *Hand v. Hall*, *supra*.

(*k*) *Ryley v. Hicks*, 1726, 1 Stra. 651.

(*l*) *Rawlins v. Turner*, 1699, 1 Ld. Raym. 736.

(*m*) *Maldon's Case*, 1586, Cro. Eliz. 33.

(*n*) *Supra*, p. 106.

(*o*) *Tidey v. Mollett*, 1864, 16 C. B. N. S. 298; *Hayne v. Cummings*, 1864, 16 C. B. N. S. 421; *Bond v. Rosling*, 1861, 1 B. & S. 371. See also *Coven v. Phillips*, 1863, 33 Beav. 18.

(*p*) *Parker v. Taswell*, 1858, 2 De G. & J. 559.

(*q*) *Clayton v. Blakey*, 1798, 8 T. R. 3; *Doe v. Bell*, 1793, 5 T. R. 471; *Richardson v. Gifford*, 1834, 1 A. & E. 52. See *supra*, p. 94.

But it follows from the decision in *Walsh v. Lonsdale* (*r*) that in all cases where possession has been given to the intending lessee, and specific performance could be obtained of the agreement for a lease constituted by the void lease, the lessee is to be treated as holding under the same terms as if a lease had been granted in pursuance of such agreement. Hence 8 & 9 Vict. c. 106, s. 3, has been virtually repealed (*s*).

3. Leases of incorporeal hereditaments.

Leases of rights of common (*t*), rights of way, tithes (*u*), advowsons (*x*), a several fishery (*y*), a warren (*z*), rights of shooting or sporting (*a*), or other incorporeal hereditaments (*b*) can only be made by deed (*c*), unless such hereditaments are appurtenant to some corporeal hereditament, in which case they will pass under a demise, even by parol, of such corporeal hereditament (*d*), though nothing is said about them at the time of the demise (*e*). An instrument not under seal demising land, and also purporting to demise incorporeal hereditaments, is not thereby rendered void as regards the land (*f*), though, where the rent reserved is an entire rent, no part of it can be

(*r*) 1882, 21 C. D. 9, 14. (*s*) *Furness v. Bond*, 1888, 4 T. L. R. 457.

(*t*) *Sury v. Brown*, 1623, Latch. 99.

(*u*) *Swadling v. Piers*, 1622, Cro. Jac. 613; *Partridge v. Ball*, 1697, 1 Ld. Raym. 136; *Gardiner v. Williamson*, 1831, 2 B. & Ad. 336, 338; *Bridgland v. Shapter*, 1839, 5 M. & W. 375. But it seems that a grant of tithes to the owner of the land might be made without deed. See 2 Roll. Abr. 63, pl. 17.

(*x*) See *Crisp's Case*, 1589, Cro. Eliz. 164. But now as to advowsons, see *supra*, p. 2.

(*y*) *D. of Somerset v. Fogwell*, 1826, 5 B. & C. 875, 882.

(*z*) Bro. Abr. tit. "Lease," pl. 12. It has been thought, however, that a lease of a warren *with the land* (for less than three years) might be good without deed. See 5 B. & C. 883.

(*a*) *Bird v. Higginson*, 1837, 2 A. & E. 696; 6 A. & E. 824.

(*b*) *Mayfield v. Robinson*, 1845, 7 Q. B. 486; *Saunders v. Owen*, 1699, 2 Salk. 467.

(*c*) *Wood v. Leadbitter*, 1845, 13 M. & W. 838, p. 842; *Hewlins v. Shippam*, 1826, 5 B. & C. 221, per Bayley, J., p. 229. But agreements for letting the tolls of any turnpike roads, signed by the trustees letting such tolls, or any two of them, or by their clerk or treasurer, and the lessee and his sureties, are valid, notwithstanding the same may not be by deed or under seal. See 3 Geo. 4, c. 126, s. 57, not printed now among the public statutes (53 & 54 Vict. c. 51, s. 3); *Markham v. Stanford*, 1863, 14 C. B. N. S. 376.

(*d*) *Skull v. Glenister*, 1864, 16 C. B. N. S. 81, 102; *Dobbyn v. Somers*, 1860, 13 Ir. C. L. R. 293; *Bridgland v. Shapter*, 1839, 5 M. & W. 375.

(*e*) See *Beaudeley v. Brook*, 1608, Cro. Jac. at p. 190.

(*f*) *Reg. v. Hockworthy*, 1837, 7 A. & E. 492.

recovered (*g*). But after the incorporeal hereditament—as a right of shooting—has been enjoyed under an invalid demise, the lessee is bound by the stipulations of the demise applicable to the period of his enjoyment (*h*).

(2) IN WHAT CASES EXTRINSIC EVIDENCE IS ADMISSIBLE.

Where the contract of lease is reduced into writing, it is presumed that the writing contains all the terms of the contract (*hh*), and, in the absence of fraud, mistake (*i*), or surprise (*k*), verbal or other extrinsic evidence is not in general admissible to contradict or add to the written instrument (*l*). If, for instance, a certain sum is specified therein as the annual rent, parol evidence will not be received to show that the tenant also agreed to pay an additional yearly sum for ground rent (*m*). So also parol evidence is not admissible to show what premises were intended to be demised—provided there is no latent ambiguity (*n*)—or to show an understanding between the parties that the rent should commence from a later date than that named in the agreement (*o*); and where the lease does not stipulate that the rent is to be a net rent without any deduction, verbal evidence is inadmissible to show the agreement of the parties that it should be such (*p*).

Exclusion of extrinsic evidence.

In the following cases, however, verbal evidence is admitted to add to or explain instruments of lease:—

Exceptions.

In order to arrive at the true effect of a lease, parol evidence is admissible of the state of the premises at the

1. Condition of property.

(*g*) *Gardiner v. Williamson*, 1831, 2 B. & Ad. 336, 338; *Bird v. Higginson*, 1835, 2 A. & E. 696. Cf. *Doe v. Lloyd*, 1800, 3 Esp. 78.

(*h*) *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403 (to leave a good breeding stock of game upon the ground); *Thomas v. Fredericks*, 1847, 10 Q. B. 775 (to compensate tenants).

(*hh*) But an antecedent agreement in writing may control the lease granted under it: see *Saleman v. Glover*, 1875, 20 Eq. 444.

(*i*) See *Garrard v. Frankel*, 1862, 30 Beav. 445.

(*k*) See *Dart's V. & P.* (6th ed.), Ch. 18, sect. 7, p. 1174, for the cases in which parol evidence is admitted on these grounds as a defence to a suit for specific performance.

(*l*) See *Woolham v. Hearn*, 1802, 7 Ves. at p. 218; *Omerod v. Hardman*, 1801, 5 Ves. at p. 730; *Baird v. Fortune*, 1861, 4 Macq. H. L. p. 149; and cf. *Martin v. Pycroft*, 1852, 2 D. M. & G. 785.

(*m*) *Preston v. Mercereau*, 1779, 2 W. Bl. 1249.

(*n*) *Meres v. Ansell*, 1771, 3 Wils. 275; *Hope v. Atkins*, 1814, 1 Price, 143; *Doe v. Webster*, 1840, 12 A. & E. 442; *Barton v. Davies*, 1850, 10 C. B. 261.

(*o*) *Heuson v. Coope*, 1841, 3 Sc. N. R. 48.

(*p*) *Rich v. Jackson*, 1794, 4 Bro. C. C. 514. See 6 Ves. 334, note (*c*).

time when it was granted, and of the mode in which they had been previously enjoyed (*q*); also of the nature and surroundings of the property at the date of the lease (*r*). Such evidence, it has been said, is admissible "to show the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument" (*s*).

2. Custom.

In the case of agricultural leases the parties are presumed to contract with reference to the custom of the country, and evidence of such custom is admitted, where not expressly or impliedly excluded by the terms of the lease (*t*).

3. Latent ambiguity.

Where a deed or instrument seems certain and without ambiguity, for anything that appears upon it, but there is some collateral matter out of the deed or instrument which produces an ambiguity, verbal or other extrinsic evidence is admissible to explain such ambiguity (*u*). Thus if upon the words of a lease of a right of way it is uncertain which of two rights of way is intended to be demised, parol evidence is admissible to show which was intended (*x*).

4. Technical terms.

Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible (*y*). Thus verbal evidence has been admitted to show that the word "thousand," in a lease of a rabbit warren, by local usage meant 1,200 (*z*); also that the word "level," in a

(*q*) *Hall v. Lund*, 1863, 1 H. & C. 676. See *Osborn v. Wise*, 1837, 7 C. & P. 761.

(*r*) *Doe v. Burt*, 1787, 1 T. R. 701; and as to identifying the property by evidence of occupation, see *Kerslake v. White*, 1819, 2 Stark. 508; *Paddock v. Findlay*, 1830, 1 Cr. & J. 90; *Magee v. Lavell*, 1874, L. R. 9 C. P. p. 114.

(*s*) Per Lord Wensleydale in *Baird v. Fortune*, 1861, 4 Macq. H. L. p. 149; quoted by Lord Coleridge, C.J., in *Magee v. Lavell*, 1874, L. R. 9 C. P. p. 112.

(*t*) *Infra*, Chap. IV. sect. 5; Chap. VII. sect. 3. See *In re Stroud*, 1849, 8 C. B. 502, 531.

(*u*) Bac. Maxims, Reg. 23. See *Coker v. Guy*, 1801, 2 B. & P. 565; judgment in *Doe v. Hiscocks*, 1839, 5 M. & W. 363, 369; *Magee v. Lavell*, 1874, L. R. 9 C. P. p. 114.

(*x*) *Osborne v. Wise*, 1837, 7 C. & P. 761.

(*y*) Starkie on Evidence, 4th ed. 701; Taylor on Evidence, 9th ed. II. 76; *Shore v. Wilson*, 1842, 9 C. & F. 365; see p. 543.

(*z*) *Smith v. Wilson*, 1832, 3 B. & Ad. 728.

mining lease, was not used in the ordinary sense of a horizontal level, but in a sense peculiar to mines (*a*). It cannot, however, be inferred as matter of law that words occurring in a lease are used by the parties in a special or technical sense; it is a question for a jury to decide in what sense the words are used in each case (*a*). Where a word is defined generally by Act of Parliament to mean a precise quantity, or a precise time, the parties using that word in a contract, must be presumed to employ it in the sense given to it by the legislature, unless it appears from other parts of the contract that they used it differently (*b*). Thus, on the change of the calendar, saints' days in leases by deed were reckoned according to the new style (*c*); though, if the lease was not by deed, this construction was not enforced, and evidence might be given of the intention of the parties (*d*).

Parol evidence (*e*) may also be given of agreements relating to the premises demised collateral or additional to those contained in the written lease, provided such additional agreements (1) are not inconsistent with the terms of the written lease (*f*), (2) do not amount to an agreement for an interest in or concerning land within sect. 4 of the Statute of Frauds (*g*), and (3) are required by the party

5. Collateral agreements.

(*a*) *Clayton v. Gregson*, 1836, 6 N. & M. 694, 5 A. & E. 302.

(*b*) See per Parke, J., in *Smith v. Wilson*, 1832, 3 B. & Ad. p. 733.

(*c*) *Doe v. Lea*, 1809, 11 East, 312; *Smith v. Walton*, 1832, 8 Bing. 235.

(*d*) *Doe v. Hopkinson*, 1823, 3 D. & Ry. 507; *Doe v. Benson*, 1821, 4 B. & A. 588. Cf. *Hogg v. Norris*, 1860, 2 F. & F. 246.

(*e*) Claims under collateral parol agreements are frequently made after the death of the landlord who is alleged to have entered into them. It has been thought that under such circumstances the uncorroborated evidence of the claimant is not to be trusted. See judgment of Mellish, L.J., in *Erskine v. Adeane*, 1873, 8 Ch. p. 766; *Stevens v. Morson*, 1881, 26 Sol. Journ. 25; *Re Wynne, Finch v. Wynne-Finch*, 1883, 48 L. T. p. 132. But in *Lawrence v. Rowley*, 27 Sol. Journ. 374, *Times*, April 4th, 1883, the Court of Appeal laid it down that on the trial before a Judge and jury of an action upon such a claim, the Judge is not bound to tell the jury to be cautious in acting upon the uncorroborated evidence of the claimant, although it is usual and wise for him to do so.

(*f*) See the judgments of Pigott, B., in *Morgan v. Griffith*, 1871, L. R. 6 Ex. p. 73, and of Mellish, L.J., in *Erskine v. Adeane*, 1873, 8 Ch. p. 766; and see *Provident Association of London*, 1895, 11 T. L. R. 391, 12 *ib.* 51.

(*g*) *Angell v. Duke*, 1875, L. R. 10 Q. B. at pp. 177—179. The question whether a collateral parol agreement by the landlord to do something during the whole of the term is an agreement not to be performed within

in whose favour they are made, as a condition of his granting or accepting the lease, as the case may be.

It has been held that a parol promise to kill down rabbits (*h*), to put the premises into a state of repair (*i*), or to pay the lessee a sum of money for this purpose (*j*) is collateral and can be enforced. In *Angell v. Duke* a parol promise by the intending lessor to do certain repairs and to send in additional furniture was at first held to be collateral (*k*), but was subsequently rejected on the ground that it should have formed part of the written agreement (*l*). Provided, however, that the third of the above requisites is satisfied, this objection does not seem to apply (*h*).

Misrepresentation.

Where there is no promise, but simply a representation by the lessor with respect to the state of the premises, and the representation turns out to be untrue, the lessee has no cause of action unless it was made fraudulently (*m*), and for fraudulent misrepresentation damages can be obtained only once (*n*).

(3) FORM AND CONSTRUCTION OF LEASE.

Lease, how constituted.

No special form of words is necessary to constitute a lease for years. Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession and the other come into the exclusive possession for a determinate time (*o*), such words, whether they

a year within sect. 4 of the Statute of Frauds, was raised in argument in *Erskine v. Adeane*, 1873, 8 Ch. at p. 764, but is not adverted to in the judgments. It is conceived that the principle of *Donellan v. Read*, 1832, 3 B. & Ad. p. 906, and *Cherry v. Heming*, 1849, 4 Ex. 631, would apply; and that by the signature or execution of the lease by the party in favour of whom the agreement was made, such agreement would be considered to have been entirely executed on one side within the year; though see *Milson v. Stafford*, 1899, 80 L. T. 590. As to an oral agreement suspending a written agreement, see *Wallis v. Littell*, 1861, 11 C. B. N. S. 369. (*h*) *Erskine v. Adeane*, 1873, 8 Ch. 756.

(*i*) *Mann v. Mann*, 1874, 43 L. J. C. P. 241 (but this case was questioned by Blackburn, J., in *Angell v. Duke*, 1875, 32 L. T. 320).

(*j*) *Seago v. Deane*, 1828, 4 Bing. 459. In this case the landlord, after the tenant had done the repairs, made a further promise to contribute to them. (*k*) 1875, L. R. 10 Q. B. 174. (*l*) 1875, 32 L. T. 320.

(*m*) *Burtsell v. Bianchi*, 1891, 65 L. T. 678; *Kennard v. Ashman*, 1894, 10 T. L. R. 213 (see p. 447); *Longman v. Blount*, 1896, 12 T. L. R. 520; *Green v. Symons*, 1897, 13 *ib.* 301.

(*n*) *Clarke v. Yorke*, 1882, 52 L. J. Ch. 32.

(*o*) See *Morgan v. Bissell*, 1810, 3 Taunt. p. 67; *Doe v. Ries*, 1832, 8 Bing. 178; *Doe v. Dodd*, 1833, 5 B. & Ad. p. 693; *Stratton v. Pettit*, 1855, 16 C. B. 420.

run in the form of a licence (*p*), covenant (*q*), or agreement (*r*), are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; for a lease for years being a contract for the possession and profits of lands on the one side, and a recompense of rent, or other income, on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly (*s*).

A lease may be made by a correspondence, in which one party offers to let or take on certain terms fully and definitely stated, and the other unconditionally accepts such offer (*t*). By correspondence.

Leases for lives of corporeal hereditaments, if not made by a conveyance operating under the Statute of Uses, or in pursuance of a power to lease, must formerly have been perfected by livery of seisin. This ceremony is not now requisite, for all corporeal tenements and hereditaments are, as regards the conveyance of the immediate freehold thereof, deemed to lie in grant as well as in livery. Lease for life.

The ordinary form of lease by deed is technically said to consist of the premises, habendum, reddendum, and covenants (*u*). 8 & 9 Vict. c. 106, s. 2.
Ordinary form of lease.

THE PREMISES contain the date, names and descriptions of the parties, recitals, consideration, operative words, parcels, and the exceptions and reservations. Premises.

THE DATE of a deed is not of the substance of the deed; for if it has no date, or a false or impossible date, yet the deed is good (*r*). Date.

(*p*) *Doe v. Dodd*, 1833, 5 B. & Ad. p. 694. See *Hall v. Sebright*, 1646, 1 Mod. 14. But it must be clear that the possession of the licensee is to be exclusive: *Doe v. Wood*, 1819, 2 B. & A. 724, 739.

(*q*) *Whitlock v. Horton*, 1606, Cro. Jac. 91. See *Right v. Thomas*, 1763, 3 Burr. 1441, 1446; *Richards v. Soley*, 1677, 2 Mod. 80; *Tisdale v. Esser*, 1611, Hob. 34; *Drake v. Munday*, 1631, Cro. Car. 207; *Fenny v. Child*, 1814, 2 M. & S. 255, 257. (*r*) *Lovelock v. Franklyn*, 1846, 8 Q. B. 371.

(*s*) Bac. Abr. (K.) p. 817. *Duxbury v. Sandiford*, 1899, 80 L. T. 552.

(*t*) *Chapman v. Bluck*, 1838, 4 Bing. N. C. 187. See *Jones v. Reynolds*, 1841, 1 Q. B. 506.

(*u*) The statutory form of lease given by the Leases Act, 1845 (8 & 9 Vict. c. 124), is seldom, if ever, used.

(*v*) *Gouldard's Case*, 1584, 2 Rep. at p. 5a.

A lease by deed is presumed to be delivered on the day on which it bears date (*x*) ; but a party may show that the deed was delivered on a different day, and in that case it takes effect from the day of delivery, and not from the day of the date (*y*).

Recitals.

RECITALS are not usually inserted in leases, even when they are made in pursuance of a power to lease ; the practice being to refer generally to the power, and the instrument creating it, in the operative words. Cases may, however, occur in which a recital of the title of the lessor is desirable in order to explain special provisions in the lease (*z*).

Consideration.

THE CONSIDERATION expresses the recompense to be rendered by the lessee for the use of the demised premises. This may either consist of the payment of rent and performance of covenants, or of the payment of a sum of money as a fine, the execution of improvements on the demised premises, or in fact any benefit conferred on the lessor either by the lessee, or by anyone else on his behalf. Where in pursuance of an agreement for a lease, a lease is tendered to the lessor for execution in which the consideration is not truly stated, the lessor is not bound to execute the lease (*a*).

Operative words.

THE OPERATIVE WORDS are those by which the lessor actually lets the premises to the lessee. The term generally used is “ demise,” but any words clearly indicating an intention of making a present demise will suffice (*b*). Under the word “ demise ” there is implied a covenant for quiet enjoyment (*c*).

DESCRIPTION OF THE PROPERTY LEASED.

Parcels.

THE PARCELS contain a description of the property intended to be let. In agricultural leases it is generally sufficient to specify the name of the farm, the number of acres it contains, and the parish and county in which it is situated.

(*x*) *Hall v. Denbigh*, 1600, Cro. Eliz. 773. See also *House v. Laxton*, 1602, *ib.* 890. (*y*) *Steele v. Mart*, 1825, 4 B. & C. 272, 279, 280.

(*z*) See for instance the form of lease in 5 Dav. Conv. Part I. 3rd ed. p. 126. Recitals may be referred to to show what premises are demised : *Doe v. Osborne*, 1840, 4 Jur. 941.

(*a*) *Vonhollen v. Knowles*, 1844, 12 M. & W. 602. As to the necessity of correctly stating the consideration under the Stamp Act, 1891, see *infra*, p. 173. (*b*) Bac. Abr. (K.) 817 ; *supra*, pp. 124, 125.

(*c*) *Infra*, Chap. IV. sect. 10 (1).

In leases of houses in towns it is usually sufficient to mention the town, street, and number of the house. Where the identity of the demised premises can be perfectly established by this description, other particulars should be omitted, since questions frequently arise as to how far words of particular explanation qualify words of general description (*d*).

In leases of mines it is usual to specify in a schedule and delineate in a map the portion of surface within or under which the minerals to be demised are situate. Care should be taken to define accurately the boundaries of the mines to be demised (*e*); and unless it is expressly stipulated that the plan on the lease shall be merely in aid or explanation of the description in the schedule, it must be seen that the plan is perfectly accurate. The nature of the liberties which the lessee is to exercise in respect of the surface and subsoil should also be clearly stated. Mines.

Frequently a choice has to be made between different parts of the description. The rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close or otherwise, a false demonstration,—*i.e.* an incorrect addition to the description inserted only for the purpose of identifying the property—may be rejected; but if premises are described in general terms, and a particular description is added, the latter controls the former (*f*). “False demonstration.”

Thus where the premises are ascertained with certainty it is permissible to reject an erroneous measurement (*g*), or name (*h*), or number (*i*), or reference to the occupation (*k*),

(*d*) 2 Platt on Leases, 27. See *Doe v. Galloway*, 1833, 5 B. & Ad. 43; *Dyne v. Nutley*, 1853, 14 C. B. 122.

(*e*) See *Davis v. Shepherd*, 1866, 1 Ch. 410; *Att.-Gen. v. Hammer*, 1858, 27 L. J. Ch. 837. As to what is a sufficiently definite description of seams of coal, see *Haywood v. Cope*, 1858, 25 Beav. 140.

(*f*) See per Parke, J., in *Doe v. Galloway*, 1833, 5 B. & Ad. at p. 51; *Morrell v. Fisher*, 1849, 4 Ex. p. 604; *Shep. Touch.* p. 247. See *Doe v. Greathed*, 1806, 8 East, at pp. 103, 104; *Doe v. Jersey*, 1818, 1 B. & A. at p. 558. *Cowen v. Truefitt, Lim.* (on appeal), 1899, 2 Ch. 309.

(*g*) *Llewellyn v. E. of Jersey*, 1843, 11 M. & W. 183; *Manning v. Fitzgerald*, 1859, 29 L. J. Ex. 24. *Cf. Jack v. McIntyre*, 1845, 12 Cl. & F. 151.

(*h*) *Rorke v. Errington*, 1859, 7 H. L. C. p. 625.

(*i*) *Cowen v. Truefitt, Lim.*, 1898, 2 Ch. 551.

(*k*) *Wrotesley v. Adams*, 1559, Plowd. p. 191; *Goodtitle v. Southern*, 1813, 1 M. & S. 299; *Doe v. Galloway*, 1833, 5 B. & Ad. 43; *Martyr v. Lawrence*, 1864, 2 D. J. & S. 261.

or other erroneous description (*l*). Where the words of description when examined do not fit any particular property with accuracy, and if there must be some modification of them in order to place a sensible construction on the instrument, the whole instrument must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded (*m*).

On the other hand, where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, and nothing more passes (*n*). Thus where a farm or houses are described as being in the occupation of a specified person, and only a part are in his occupation, that part alone will pass (*o*). So where they are described as being in a particular city (*p*), parish (*q*), or county (*r*), only the part so situated will pass. And, in accordance with the rule quoted above, the same principle applies where property which is described generally in the first instance is particularized by a specific description (*s*); where, for instance, the details are enumerated either in the body of the deed (*t*), or in a schedule (*u*), or by reference to a plan (*x*). In such cases only the items so enumerated will pass (*y*).

Abutments.

Where property is described by reference to abutments, these are not construed strictly, unless a strict construction increases the value of the land, and it was an

(*l*) *Cunningham v. Butler*, 1861, 3 Giff. 37.

(*m*) Per Lord Selborne, C., in *Hardwick v. Hardwick*, 1873, 16 Eq. 168, 175. See *Re Bright-Smith*, 1886, 31 C. D. 314.

(*n*) Per Erle, C.J., in *Webber v. Stanley*, 1864, 16 C. B. N. S. p. 752.

(*o*) *Re Seal*, 1894, 1 Ch. 316; *Magee v. Lavell*, 1874, L. R. 9 C. P. 107; *Morrell v. Fisher*, 1849, 4 Ex. 591; *Dyne v. Nutley*, 1853, 14 C. B. 122.

(*p*) *Hall v. Combes*, 1592, Cro. Eliz. 368; *Doddington's Case*, 1594, 2 Rep. 32 b; *Doe v. Grented*, 1806, 8 East, 91.

(*q*) *Pedley v. Dodds*, 1866, 2 Eq. 819; *Evans v. Angell*, 1858, 26 Beav. 202.

(*r*) *Webber v. Stanley*, *supra*.

(*s*) *Doe v. Parkin*, 1814, 5 Taunt. 321.

(*t*) *Griffiths v. Penson*, 1863, 9 Jur. N. S. 385.

(*u*) *Wood v. Rowcliffe*, 1851, 6 Ex. 407; *Re Craig*, 1869, Ir. R. 4 Eq. 158.

(*x*) *Barton v. Dawes*, 1850, 10 C. B. 261. As to the construction of a deed by reference to a plan, see *Lyle v. Richards*, 1866, L. R. 1 H. L. 222.

(*y*) But see *Baker v. Richardson*, 1858, 6 W. R. 663.

inducement to the lessee that he should have the land actually described (*z*).

Whether anything is or is not parcel of the premises demised is a question of fact for the jury (*a*); and a lease will be construed with reference to the state of facts existing at its date, unless the result is such as to call for the interference of equity (*b*). A lease of rooms in a house, in themselves constituting a separate dwelling, includes the outer walls of the house so far as they solely belong to the rooms let; hence the lessor or another tenant is not entitled to place advertisement boards over such part of the walls (*c*). A small strip of waste land between the demised premises and an adjacent highroad, the soil of the land and the road being in the lessor, will be presumed to be included in the demise (*d*). Land enclosed by the lessee is deemed to be enclosed for the benefit of the lessor (*e*). Apparently the lease will convey to the lessee an interest in the soil to the centre of all roads and streets (*ee*) adjacent to the demised premises (*f*).

Premises included in demise.

In framing parcels the following particulars should be borne in mind:

Legal meaning of terms of description.

1. "Land."

Land has been said to mean strictly arable land (*g*); but the term comprehends in law any ground, soil, or earth whatsoever, as meadows (*h*), pastures, moors, marshes, and heath (*i*); and will *primâ facie* include all buildings, woods, or water thereupon (*i*), and all mines and minerals thereunder (*k*).

(*z*) *Roberts v. Karr*, 1809, 1 Taunt. 495.

(*a*) Per Buller, J., in *Doe v. Burt*, 1787, 1 T. R. at p. 704; *Lyle v. Richards*, 1866, L. R. 1 H. L. 222.

(*b*) *Crisp v. Price*, 1814, 5 Taunt. 548.

(*c*) *Carlisle Café Co. v. Muse Bros. & Co.*, 1897, 46 W. R. 107. Though it would seem that the user of them by the tenant must be reasonable. *Ibid.*

(*d*) *Doe v. Pearsey*, 1827, 7 B. & C. 304.

(*e*) *Kingsmill v. Millard*, 1855, 11 Ex. 313; *infra*, p. 513.

(*ee*) See *Re White's Charities*, 1898, 1 Ch. 659.

(*f*) *Hodges v. Lawrence*, 1854, J. P. 347. See *Tidswell v. Whitworth*, 1867, L. R. 2 C. P. p. 333, and cases there cited.

(*g*) *Shep. Touch.* 91.

(*h*) *Cooke v. Yates*, 1827, 4 Bing. 90.

(*i*) *Co. Litt.* 4 a.

(*k*) *Newcomen v. Coulson*, 1877, 5 C. D. p. 143. So "close" includes both the surface and the subsoil: *Cox v. Glue*, 1848, 5 C. B. p. 551. A grant of a "warren" in general imports a grant of a franchise only: *E. Beauchamp v. Winn*, 1873, L. R. 6 H. L. 223, pp. 236, 238; but it seems that by a lease of a warren in a man's own ground, in the absence of any context showing a different intention, the land itself will pass: *Co. Litt.* 5 b; *Shep. Touch.* 90; L. R. 6 H. L. pp. 236, 237, 255. Under a lease of a "warren of conies" the land will not pass: *E. Beauchamp v. Winn*.

2. "Water." Under the word *water*, it seems that a right of fishing will pass, but the soil will not pass (*l*). To include the soil under the water the description should be *land covered with water* (*l*). But under the word *pond* or *pool*, it seems that the soil will pass (*m*).
3. "Farm." *Farm* includes the farm-house, farm buildings, and the lands thereunto belonging, or therewith used (*n*); and may also comprehend woodlands (*o*).
The words *farming buildings*, it seems, include the farm-house (*p*).
4. "Messuage." *Messuage* or *house* (the terms are synonymous (*q*)) may comprehend, besides the house and buildings adjoining, a courtyard, garden (*r*), and orchard belonging to the same (*s*), and the stables and other outhouses necessary for the convenient occupation of the house (*t*).
5. "Tenements." The word *tenements* in its proper and legal sense signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind (*u*).
6. "Premises." The word *premises* in "house and premises" will be restricted to matters intimately connected with the house (*x*).
7. "More or less." The words *more or less*, appended to the measurements in the parcels, being indeterminate, if the land occupied by the tenant exceeds such measurements but corresponds with the abuttals, the tenant has a fair title to insist that it was meant that so much should pass by the
 - (*l*) Co. Litt. 4 b.
 - (*m*) Co. Litt. 5 b. See *R. v. Old Alresford*, 1786, 1 T. R. 358.
 - (*n*) Shep. Touch. 93.
 - (*o*) *Goodtitle v. Paul*, 1760, 2 Burr. 1089; *Portman v. Mill*, 1839, 3 Jur. 356.
 - (*p*) *Cooke v. Cholmondeley*, 1858, 4 Drew. 326.
 - (*q*) See *Doe v. Collins*, 1788, 2 T. R. 502.
 - (*r*) *Carden v. Tuck*, 1588, Cro. Eliz. 89; *Smith v. Martin*, 1672, 2 Wms. Saund. (ed. 1871) 806, see notes; *Hewson v. South Western Ry. Co.*, 1860, 8 W. R. 467; *Grosvenor v. Hampstead Junction Ry. Co.*, 1857, 1 De G. & J. 446; *Cole v. West London, &c. Ry. Co.*, 1859, 27 Beav. 242; *Marson v. London, Chatham and Dover Ry. Co.*, 1868, 6 Eq. 101; *Salter v. Metrop. Dist. Ry. Co.*, 1870, 9 Eq. 432.
 - (*s*) Shep. Touch. 94; Co. Litt. 5 b, 56 b.
 - (*t*) *Doe v. Collins*, 1788, 2 T. R. 498. See *Steele v. Midland Ry. Co.*, 1866, 1 Ch. 275, 291. A *fascia* passes as parcel of the premises: *Francis v. Hayward*, 1882, 22 C. D. 177.
 - (*u*) Black. Comm. Bk. II., c. 2, p. 16, cited L. R. 6 H. L. p. 241.
 - (*x*) *Minton v. Gleiger*, 1873, 28 L. T. 449. As to "yards," see *Willis v. Watney*, 1881, 51 L. J. Q. B. 181.

demise (*y*). And where the lessor sees the daily progress of a building which does not extend beyond the land defined by the abutments, he will not be allowed to claim the overplus beyond the measured distance as an encroachment (*y*). The words only apply in cases where the difference bears a small proportion to the amount named (*a*); and similarly as to the words "or thereabouts" (*b*).

The primary meaning of *mine* is "vein or seam" (*c*); 8. "Mine." and when unopened mines are spoken of, the term "mine" means nothing more nor less than "vein or seam" (*d*). The word is, however, commonly (*e*) used in leases to include both the vein or seam and the subterranean excavations made to win it (*f*). In the latter sense it is not restricted to workings of coal or substances popularly called minerals. Underground workings of limestone (*g*) or clay (*i*) are mines. But to constitute a mine the working must be underground, and not an open working on the surface (*h*).

Minerals *primâ facie* include every substance which 9. "Minerals." can be got from beneath the surface of the earth for the purpose of profit (*l*), whether from a mine or by open working (*m*); not only minerals usually so called, but clay (*n*), china clay (*o*), every kind of stone (*p*),

(*y*) *Neale v. Parkin*, 1794, 1 Esp. 229, 230.

(*a*) *Cross v. Eglin*, 1831, 2 B. & Ad. p. 110. See *Day v. Finn*, Owen, 133.

(*b*) *Davis v. Shepherd*, 1866, 1 Ch. 410.

(*c*) *Abinger v. Ashton*, 1873, 17 Eq. p. 369.

(*d*) *Ramsay v. Blair*, 1876, 1 App. Cas. p. 705.

(*e*) *Danwill v. Roper*, 1855, 3 Drew. 299; *Bell v. Wilson*, 1866, 1 Ch. p. 308.

(*f*) *Midland Ry. Co. v. Haunchwood, &c. Co.*, 1882, 20 C. D. p. 555.

(*g*) See *R. v. Sidgley*, 1831, 2 B. & Ad. 65. For the unusual case of a mine of freestone, see *R. v. Dunsford*, 1835, 2 A. & E. 568.

(*h*) *R. v. Brettell*, 1832, 3 B. & Ad. 424.

(*k*) *Tucker v. Linger*, 1882, 21 C. D. p. 36; *Bell v. Wilson*, 1865, 2 Dr. & Sm. p. 399; *Lord Provost of Glasgow v. Fairie*, 1888, 13 App. Cas. 657, per Lord Macnaghten, p. 686; but see per Lords Watson and Herschell, pp. 673, 680.

(*l*) *Hext v. Gill*, 1872, 7 Ch. p. 712. See *Bell v. Wilson*, 1865, 2 Dr. & Sm. p. 398; *Robinson v. Milne*, 1884, 53 L. J. Ch. 1070; *Tucker v. Linger*, 1883, 8 App. Cas. p. 512. And cf. *Lord Provost of Glasgow v. Fairie*, 1888, 13 App. Cas. 657; *Johnstone v. Crompton*, 1899, 2 Ch. 190.

(*m*) *Midland Ry. Co. v. Haunchwood, &c. Co.*, 1882, 20 C. D. p. 555.

(*n*) *Errington v. Metrop. Ry. Co.*, 1882, 19 C. D. p. 571; *Salisbury v. Gladstone*, 1860, 6 H. & N. 127.

(*o*) *Hext v. Gill*, 1872, 7 Ch. p. 699.

(*p*) *Midland Ry. Co. v. Cleckley*, 1867, 4 Eq. p. 25. See *Bell v. Wilson*, 1866, 1 Ch. 303, 307; *Micklethwait v. Winter*, 1851, 6 Ex. 644; *E. of Rosse v. Wainman*, 1845, 14 M. & W. 859; aff. 2 Ex. 800.

brick earth (*q*), gravel and sand (*r*), and coprolites beneath the surface (*s*); but not mounds of "tap-cinder" (*t*). It seems that it will *primâ facie* include flints turned up in the ordinary course of ploughing (*u*). Where "mines and minerals" are specified, the prefixing of "mines" does not *primâ facie* restrict "minerals" (*x*).

A grant or lease of minerals implies a power to get them and bring them to the surface (*y*); but if the lessee is to have the right to let down the surface, this must be clearly expressed (*z*).

Damage by
subsidence.

Where mines were granted by deed, with power for the grantee and his assigns to work them, making reasonable compensation for all damage occasioned to the surface of the land or to the buildings thereon by the exercise of the power, it was held that damage by subsidence was not within the compensation clause, and hence the assigns of the grantee were liable to an action for damages for injury to the surface of the land due to subsidence caused by the working of the mines (*a*). But the lessee of underground strata is not liable for subsidence due to an excavation made by his predecessor in title prior to the date of the lease, and not to any act of the lessee (*a*).

EASEMENTS.

10. "Appurtenances."

The word *appurtenances* will pass only things which have been used together with the house or land demised, or which are reputed or accepted as parcel thereof (*b*).

(*q*) *Tucker v. Linger*, 1882, 21 C. D. p. 36. See 8 App. Cas. 508. *E. of Jersey v. Neath Guardians*, 1889, 22 Q. B. D. 555.

(*r*) See *Earl Cowley v. Wellesley*, 1866, 1 Eq. 659; *Errington v. Metrop. Ry. Co.*, 1882, 19 C. D. p. 571; *Tucker v. Linger*, 1882, 21 C. D. p. 36.

(*s*) See *Att.-Gen. v. Tomline*, 1877, 5 C. D. 750.

(*t*) *I.e.* refuse arising from the puddling of pig-iron which has been thrown upon land with the intention that it should again form part of the earth: *Boileau v. Heath*, 1898, 2 Ch. 301.

(*u*) See judgments in *Tucker v. Linger*, 1882, 21 C. D. pp. 36, 38, 39.

(*x*) *Hext v. Gill*, 1872, 7 Ch. p. 712; *Midland Ry. Co. v. Robinson*, 1887, 37 C. D. 386.

(*y*) *Ramsey v. Blair*, 1876, 1 App. Cas. p. 703. See *Rowbotham v. Wilson*, 1860, 8 H. L. C. p. 360.

(*z*) See cases cited, *infra*, p. 140.

(*a*) *Greenwell v. Low Beechburn Coal Co.*, 1897, 2 Q. B. 165. See *Davis v. Treharne*, 1881, 6 App. Cas. 460; *E. of Westmoreland v. New Sharlston Coll. Co.*, 1899, 43 Sol. Journ. 569.

(*b*) *Bryan v. Weatherhead*, 1623, Cro. Car. 17; *Kerslake v. White*, 1819,

As appurtenant to a house, under the word “appurtenances” a curtilage and a garden (*c*) may pass; also an incorporeal right, such as a right of way (*cc*), or a right of turbary (*d*); but, as a general rule, not land (*e*). As appurtenant to land there may pass, where the same word is used, a sheep-walk (*f*), also a right of turbary (*d*), or an existing right of way (*g*), but not, it seems, a right of common (*h*); and not a right of way or other easement which has become extinct, or does not exist in point of law by reason of unity of seisin of the dominant and servient tenements (*i*), unless such easement is either an easement of necessity, or in its nature continuous, in which case it will pass by implication of law without any words of grant (*k*).

Under the words *with all ways to the same belonging or appertaining*, no way will pass unless legally appurtenant (*l*); or unless it appears from the grant itself that the parties meant to use the words in a more extended sense than the legal one (*m*). But under the word “appurtenances” a quasi-easement—that is, a user in the nature of an easement, exercised by the lessor over land of his own adjacent to the demised premises—

2 Stark. 508; *Chappell v. Mason*, 1894, 10 T. L. R. 404. See *Maitland v. Muckinnon*, 1862, 1 H. & C. 607; *Smith v. Ridgway*, 1866, L. R. 1 Ex. 331. (*c*) *Bettisworth's Case*, 1591, 2 Rep. at p. 32.

(*cc*) *Thorpe v. Brumfitt*, 1873, 8 Ch. 650.

(*d*) *Solne v. Bullock*, 1684, 3 Lev. 165; *Dobbyn v. Somers*, 1860, 13 Ir. C. L. R. at p. 300.

(*e*) *Hearn v. Allen*, 1627, Cro. Car. 57; *Wilmote v. Carn*, 1603, Cro. Eliz. 918; *Buck v. Nurton*, 1797, 1 B. & P. 53; but see *Doe v. Martin*, 1777, 2 W. Bl. 1148.

(*f*) *Hurleston v. Woodroffe*, 1619, Cro. Jac. 519.

(*g*) *Morris v. Edgington*, 1810, 3 Taunt. p. 30; *Hinchcliffe v. Kinnoul*, 1838, 5 Bing. N. C. 1; *Skull v. Glenister*, 1864, 16 C. B. N. S. 81, p. 91; *Thorpe v. Brumfitt*, 1873, 8 Ch. 650. See *Worthington v. Gimson*, 1860, 2 E. & E. 618; *Harding v. Wilson*, 1823, 2 B. & C. 96.

(*h*) *Beaudely v. Brook*, 1608, Cro. Jac. p. 190. See *Bradshaw v. Eyre*, 1598, Cro. Eliz. 570.

(*i*) Per Denman, C.J., in *Plant v. James*, 1833, 5 B. & Ad. at p. 794; 4 A. & E. p. 761; *Grymes v. Peacock*, 1610, 1 Bulstr. 17; *Saundeys v. Oliffe*, 1591, Moo. 467; *Whalley v. Tompson*, 1799, 1 B. & P. 371; *Clements v. Lambert*, 1808, 1 Taunt. 205; *Barlow v. Rhodes*, 1833, 1 Cr. & M. 439, p. 448.

(*k*) *Polden v. Bastard*, 1865, L. R. 1 Q. B. p. 161; *Watts v. Kelson*, 1871, 6 Ch. 166, 173, 174; *Pheysay v. Vicary*, 1847, 16 M. & W. p. 491; *Corp. of London v. Riggs*, 1880, 13 C. D. 798.

(*l*) *Harding v. Wilson*, 1823, 2 B. & C. 96; *Brett v. Clowser*, 1880, 5 C. P. D. 376; *Baring v. Abingdon*, 1892, 2 Ch. 374.

(*m*) *Barlow v. Rhodes*, 1833, 1 Cr. & M. 439.

will pass if it appears that such was the intention of the parties (*u*).

11. "There-
with used and
enjoyed."

It was formerly held that, where there had been unity of possession, under a grant of ways and other easements at the time of the lease used or enjoyed with the demised premises only those easements would pass which had actually existed as legal easements before the unity of possession of the dominant and servient tenements (*o*). The words revived a right of way which had once existed, but could not create such a right (*p*). It is settled, however, that the words are effectual to pass a quasi-easement which is in its nature continuous and apparent (*q*), and a right of way, if it is over a formed road (*r*), is regarded as an easement of this character (*s*). It is sufficient if the right has been used with any part of the demised premises (*t*). But under the words "heretofore used and enjoyed" a right of way which has been disused for some years before the date of the grant will not pass (*u*).

Conveyancing
Act, 1881 (*x*),
s. 6, sub-s. (1).

It is now enacted that, as regards leases made since 31st December, 1881, a conveyance of "land"—which includes a lease (*y*)—shall be deemed to include, and shall by virtue of the Act operate to convey with the land (*inter alia*), all commons, ways, waters, watercourses, and easements whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land or any part thereof.

Sub-sect. (2).

And a conveyance of land, having houses or other buildings thereon, shall be deemed to include, and shall by virtue of the Act operate to convey, with the land, houses, or other buildings, (*inter alia*) all sewers, gutters, drains,

(*n*) *Morris v. Edgington*, 1810, 3 Taunt. 24; *Thomas v. Owen*, 1887, 20 Q. B. D. 225.

(*o*) *Barlow v. Rhodes*, 1833, 1 Cr. & M. p. 448.

(*p*) *Langley v. Hammond*, 1868, L. R. 3 Ex. p. 168.

(*q*) *Watts v. Kelson*, 1871, 6 Ch. 166.

(*r*) *Ibid.*, per Mellish, C.J., p. 174.

(*s*) *Kay v. Oxley*, 1875, L. R. 10 Q. B. 360; *Barkshire v. Grubb*, 1881, 18 C. D. 616; *Bayley v. G. W. Ry. Co.*, 1884, 26 C. D. 434; *Ford v. Metro. Ry. Co.*, 1886, 17 Q. B. D. 12.

(*t*) *Koostra v. Lucas*, 1822, 5 B. & A. 830.

(*u*) *Roe v. Siddons*, 1888, 22 Q. B. D. 224.

(*x*) 44 & 45 Vict. c. 41.

(*y*) Sect. 2 (*v*).

ways, passages, lights(*z*), watercourses, and easements whatsoever, appertaining or reputed to appertain to the lands, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

The section applies only if and as far as a contrary intention is not expressed in the conveyance (*a*). But in the absence of any such expression of a contrary intention the lessee is entitled to the benefit of all quasi-easements which, according to the above decisions, would pass under the words "occupied or enjoyed with" the demised premises.

It seems, indeed, that upon the severance of two tenements the grantee will, even without words of express grant, whether in the deed or incorporated by virtue of the Conveyancing Act, take any continuous and apparent easements which have been exercised for the benefit of the tenement granted over the other (*b*), such as a right of light (*c*), or a defined and permanent right of way (*d*). But in general, where the servient part of the tenement is granted, there is no corresponding implied reservation of easements in favour of the grantor (*e*); though the rule is subject to certain exceptions, as in the case of ways of necessity (*f*), and it will not authorize any act contrary to the good faith of a particular contract (*g*). If the lessor wishes to reserve rights in derogation of his grant, he must do so in plain terms (*h*).

Severance
of tenements.

(*z*) See *Beddington v. Atlee*, 1887, 35 C. D. 317; *Broomfield v. Williams*, 1897, 1 Ch. 602.

(*a*) Sub-sect. (4). As to what will amount to an expression of a contrary intention, see *Birmingham, &c. Banking Co. v. Ross*, 1888, 38 C. D. p. 308; *Re Peck and School Board for London*, 1893, 2 Ch. 315; *Broomfield v. Williams*, 1897, 1 Ch. 602.

(*b*) *Pearson v. Spencer*, 1861, 1 B. & S. p. 583; *Polden v. Bastard*, 1865, L. R. 1 Q. B. p. 161; *Watts v. Kelson*, 1871, 6 Ch. p. 174.

(*c*) *Phillips v. Low*, 1892, 1 Ch. 47.

(*d*) *Brown v. Alubaster*, 1887, 37 C. D. 490; *Kay v. Oxley*, 1875, L. R. 10 Q. B. 360; *Thomas v. Owen*, 1887, 20 Q. B. D. 225; and see cases cited *supra*, p. 134, note (*s*).

(*e*) *Wheelton v. Burrows*, 1879, 12 C. D. 31, 49.

(*f*) *Wheelton v. Burrows*, *ubi sup.* p. 57; *Taurs v. Knowles*, 1891, 2 Q. B. p. 568.

(*g*) *Russell v. Watts*, 1885, 10 App. Cas. p. 596.

(*h*) *Mundy v. Duke of Rutland*, 1883, 23 C. D. 81; *Whitehead v. Parks*, 1858 2 H. & N. 870.

Implied grant
of easement.

An easement may be created by implied grant, if the circumstances show that it was the intention of the parties that the easement should be enjoyed by the lessee (*i*). Thus a grant of a right of way may be implied from a reference on a plan to a new street as adjoining the demised premises (*j*); though the lessee may not be entitled to the full width of the road as indicated in the plan, but only to a convenient way (*k*).

Where upon a grant of a right of way the way has not been defined, it is for the grantor to select it; but when he has done so, he cannot afterwards alter the way (*m*).

A grant of land with a building upon it carries the right to light as against adjacent premises of the grantor sufficient for the ordinary purposes of the building (*n*), but the grantor may reserve to himself the right to obstruct an easement of light which passes on the grant (*o*).

Fixtures.

Where nothing appears to the contrary, fixtures will pass upon a grant of a house although they are not mentioned (*p*). But the specific mention of certain fixtures will be taken as showing an intention that others should not pass (*q*). The acceptance of a lease of a house containing fixtures does not raise an implied contract to pay for them (*r*).

EXCEPTIONS AND RESERVATIONS.

Exceptions
and reser-
vations.

AN EXCEPTION is always of part of the thing granted, and of a thing *in esse* at the time of the grant. It must not be repugnant to the grant so as to make it nugatory (*s*). A

(*i*) *Hall v. Lund*, 1863, 1 H. & C. 676; *Cannon v. Villars*, 1878, 8 C. D. 415.

(*j*) *Espley v. Wilkes*, 1872, L. R. 7 Ex. 298; *Furness Ry. Co. v. Cumberland Building Society*, 1885, 52 L. T. 144.

(*k*) *Harding v. Wilson*, 1823, 2 B. & C. 96.

(*m*) *Deacon v. S. E. Ry. Co.*, 1869, 61 L. T. 377. As to way of necessity, see *Bolton v. Bolton*, 1879, 11 C. D. 968. As to the extent of a right of way, see *Cannon v. Villars*, 8 C. D. 415; *Cousens v. Rose*, 1871, 12 Eq. 366; *Hawkins v. Carbines*, 1857, 27 L. J. Ex. 44; and as to mode of access, *Cooke v. Ingram*, 1893, 68 L. T. 671.

(*n*) *Corbett v. Jonas*, 1892, 3 Ch. 137.

(*o*) *Haynes v. King*, 1893, 3 Ch. 439.

(*p*) *Colegrave v. Dias Santos*, 1823, 2 B. & C. 76; *Longstaffe v. Meagoe*, 1834, 2 A. & E. 167. As to the operation of the Bills of Sale Acts on grants of fixtures, see *Weir on Bills of Sale*, pp. 80—89, 165, 185.

(*q*) *Hare v. Horton*, 1833, 5 B. & Ad. 715.

(*r*) *Goff v. Harris*, 1843, 5 M. & Gr. 573.

(*s*) *Dorrell v. Collins*, 1582, Cro. Eliz. 6; *Horneby v. Clifton*, 1567, Dyer, 264 a. See *Miller v. Pratt*, 1606, *ib.*, note (40); and *cf. Leigh v.*

RESERVATION is of a thing not *in esse*, but newly created or reserved out of the land or tenement demised (*t*). What will pass by words in a grant will be excepted by the same or the like words in a reservation (*u*). Strictly, however, the term "reservation" applies only to rent and to payments and services in the nature of rent which can be said to issue out of the demised premises (*x*). A reservation of incorporeal rights, such as the liberty of hunting, fishing, and fowling, is not legally a reservation or exception. It is a privilege granted to the lessor, and it takes effect by way of grant by the lessee (*x*). So it has been said that a right of way cannot in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation (*y*). From the doctrine that the reservation of an incorporeal hereditament takes effect by way of grant, it follows on the one hand that for the reservation to be effectual the lease must be executed by the lessee (*z*), and on the other that the benefit of the reservation may enure in favour of a person who is not a party to the lease (*a*). A reservation in favour of the grantor and his assigns is available for licensees of the grantor, and not only for his assigns in the strict sense (*b*).

The words of an exception are usually construed against Construction of exception.

Shaw, 1594, Cro. Eliz. 372; *Cochrane v. M'Cleary*, 1869, Ir. R. 4 C. L. 165; *Jenkins v. Green* (No. 1), 1858, 27 Beav. 437; *Moroney v. Macnamara*, 1872, 20 W. R. 905.

(*t*) Co. Litt. 47 a. See *Cooper v. Stuart*, 1889, 14 A. C. p. 289.

(*u*) Shep. Touch. 100. (*x*) *Doe v. Lock*, 1835, 2 A. & E. 705, 743.

(*y*) Per Tindal, C.J., in *Durham, &c. Ry. Co. v. Walker*, 1842, 2 Q. B., p. 967. As to a reservation of a power to make or to use sewers through the demised premises, see *Lee v. Stevenson*, 1858, E. B. & E. 512; *Chadwick v. Marsden*, 1867, L. R. 2 Ex. 285.

(*z*) *Durham, &c. Ry. Co. v. Walker*, *supra*.

(*a*) *Wickham v. Hawker*, 1840, 7 M. & W. 63. Cf. *Pannell v. Mill*, 1846, 3 C. B. 625; and see *Houston v. M. of Sligo*, 1886, 55 L. T. 614; *Dynevor v. Tennant*, 1888, 13 A. C. 279. As to the exception of a water-course, see *Doe v. Williams*, 1848, 11 Q. B. 688, 700; as to the reservation of the free running of water and soil, see *Chadwick v. Marsden*, 1867, L. R. 2 Ex. 285, 289; as to an exception of "all mosses and turbaries," see *Quinn v. Shields*, 1877, Ir. R. 11 C. L. 254, 264; and as to the implied reservation of an easement of support, see *Howarth v. Armstrong*, 1897, 13 T. L. R. 529.

(*b*) *Mitcalfe v. Westaway*, 1864, 17 C. B. N. S. 658. But see *Reynolds v. Moore*, 1898, 2 I. R. 641.

the lessor and in favour of the lessee (*c*). It seems, however, that when a certain number of acres are to be excepted from a lease, without any specification of the particular acres intended to be excepted, the lessor has, before the lease is actually granted, the right to select the acres to be excepted from the lease (*d*). But if the lease has been actually granted in the terms of the agreement, without specifying the lands excepted, the right of selecting the excepted lands will rest with the tenant (*d*). The landlord's right of selection must not be exercised oppressively, or in a manner which will make it impossible or difficult for the lessee usefully and advantageously to occupy the rest of the farm (*d*). Where in a contract of sale there was a reservation of the land necessary for making a railway through the estate to a specified place, the reservation was void for uncertainty, and the contract was not enforceable (*e*).

Exception of trees.

An exception of trees does not include fruit trees (*f*), even though it is an exception of *all timber trees and other trees but not the annual fruit thereof*; for the term *fruit* in legal acceptation is not confined to the produce of those trees which in popular language are called fruit trees, but applies also to the produce of such trees as the oak and walnut (*g*). Under an exception of *all and all manner of timber, &c., wood, underwood, bushes and thorns, other than such bushes and thorns as shall be necessary for the repairs of the fences*, all bushes, whether forming part of the fences or not, or necessary for repairs or not, are excepted out of the demise (*h*). The meaning of the clause is, that there is reserved to the tenant the right of taking all or parts of the thorns or bushes for repairs when required (*h*).

An exception of *woods and underwoods* extends to the soil on which the trees grow (*i*), if there are no expressions showing that it was intended to confine the exception to the

(*c*) Shep. Touch. 100; *Bullen v. Denning*, 1826, 5 B. & C. 842, 847, 850; *Cardigan v. Armitage*, 1823, 2 B. & C. 197, 207.

(*d*) *Jenkins v. Green* (No. 1), 1858, 27 Beav. 437.

(*e*) *Pearce v. Watts*, 1875, 20 Eq. 492.

(*f*) *London v. Southwell*, 1619, Hob. 303; *Wyndham v. Way*, 1812, 4 Taunt. 316; note (*a*), p. 318.

(*g*) Per Bayley, J., in *Bullen v. Denning*, 1826, 5 B. & C. 842.

(*h*) *Jenney v. Brook*, 1844, 6 Q. B. 323.

(*i*) *Ire v. Sams*, 1597, Cro. Eliz. 521; 5 Rep. 11 a; *Whistler v. Paslow*, 1619, Cro. Jac. 487; *Rolls v. Rock*, 1729 2 Selw. N. P. (13th ed.) 1244.

trees themselves (*k*). On the other hand, an exception of *all timber trees* (*l*) will comprise only so much of the soil as is sufficient for the vegetation and growth of the trees excepted (*m*).

When anything is excepted, all things that are depending on it, and are necessary for the obtaining of it, are excepted also (*n*). Hence, where timber is excepted, the lessor is entitled to enter on the demised premises to show it to intending purchasers, and he or his vendee may cut the trees down and take them away (*o*). If the lease is not under seal, the lessor enters for this purpose as licensee of the lessee (*p*). In the case of a reservation of ornamental timber, where, with the consent of the lessor, the lessee has spent money in improving the grounds, the lessor has been restrained from cutting the timber (*q*). Where trees and timber are excepted from the lease, the lessee is not, in the absence of an express agreement to that effect, bound to protect the trees and timber from his cattle (*r*).

In an exception of mines and minerals these terms have the same meanings as stated above (*s*). The holder of a building lease where minerals are reserved has a right to dig foundations for buildings about to be erected, and dispose of the materials dug out, but not to do so in order to improve the surface as a building site (*t*).

Exception of
mines and
minerals.

Under an exception of mines, everything is excepted that is necessary for working them, including way-leave for

(*k*) *Legh v. Heald*, 1830, 1 B. & Ad. 622; *Pincomb v. Thomas*, 1619, Cro. Jac. 524.

(*l*) See *infra*, p. 355.

(*m*) *Liford's Case*, 1615, 11 Rep. p. 50 a; *Whistler v. Paslow*, 1619, Cro. Jac. 487. See *Legh v. Heald*, 1830, 1 B. & Ad. 622; 2 Platt on Leases, 42.

(*n*) Shep. Touch. 100.

(*o*) Shep. Touch. 100; *Liford's Case*, 1615, 11 Rep. p. 52 a; *Phillips v. Doyle*, 1887, 32 Sol. Journ. 11 (Newport (Mon.) County Court), and see this case as to damage caused by negligent removal of trees.

(*p*) *Hewitt v. Isham*, 1851, 7 Ex. 77.

(*q*) *Jackson v. Cator*, 1800, 5 Ves. 688.

(*r*) *Clithero v. Higgs*, 1637, Sir W. Jones, 388; *Glenham v. Hanby*, 1701, 1 Lord Raym. 739.

(*s*) *Supra*, p. 131. As to a prehistoric chattel, see *Elwes v. Brigg Gas Co.*, 1886, 33 C. D. 562; and as to a custom to take away and sell flints turned up in course of husbandry not being inconsistent with the exception, see *Tucker v. Linger*, 1883, 8 A. C. 508.

(*t*) *Robinson v. Milne*, 1884, 53 L. J. Ch. 1070.

carrying away the minerals (*u*); but a reservation of mines and quarries, with full power to win and work the same, does not include the right of so working them as to let the surface down (*x*). In this respect the exception resembles the ordinary power conferred upon a lessee under a mining lease (*y*). If, therefore, it is intended that the lessor should have this power, the intention should be clearly expressed (*z*). Perhaps, however, if the excepted minerals are such as cannot be got at all without destroying the surface, the exception will include the right to do so, the person working the mines paying compensation (*a*).

A reservation of a right to work minerals is not equivalent to an exception of the minerals. It is a grant of an incorporeal hereditament, and confers no exclusive right to work the minerals on the grantee—that is, the lessor (*b*).

An exception of “minerals” only, or of “coal,” will not include the space in which the minerals or coal are contained (*c*), so as to give the lessor any interest in the space left after they have been worked. Hence under these words the lessor will not have the right to carry through such space minerals won from land not specified in the lease (*d*). But an exception of all “mines” includes not merely the mineral substances, but also the space in which they are contained (*e*).

THE TERM.

Habendum.

The proper office of the HABENDUM is to restrain the generality of the premises (*f*). It limits and ascertains the

(*u*) *Proud v. Bates*, 1865, 34 L. J. Ch. p. 411; *Cardigan v. Armitage*, 1823, 2 B. & C. 197, 207.

(*x*) Judgment in *Proud v. Bates*, 34 L. J. Ch. p. 412.

(*y*) See *Davis v. Treharne*, 1881, 6 App. Cas. 460.

(*z*) See for cases where the words have been held insufficient, *Harris v. Ryding*, 1839, 5 M. & W. 60; *Roberts v. Haines*, 1856, 6 E. & B. 643; *Smart v. Morton*, 1855, 5 E. & B. 30.

(*a*) *D. of Buccleugh v. Wakefield*, 1870, L. R. 4 H. L. 377. But see the language of the reservation in that case, and *cf. Heat v. Gill*, 1872, 7 Ch. p. 716.

(*b*) *Duke of Sutherland v. Heathcote*, 1892, 1 Ch. 475. See *supra*, p. 85.

(*c*) See *Ramsay v. Blair*, 1876, L. R. 1 App. Cas. 702, 704; *Metrop. Dist. Ry. Co. v. Cosh*, 1880, 13 C. D. p. 614.

(*d*) *Ramsay v. Blair*, 1876, 1 App. Cas. p. 702. But see *Hamilton v. Graham*, 1871, L. R. 2 Sc. & D. 166.

(*e*) *Proud v. Bates*, 1865, 34 L. J. Ch. 411; *Hamilton v. Graham*, *supra*; *Eardley v. Granville*, 1876, 3 C. D. p. 835. See *Bowson v. Maclean*, 1860, 2 D. F. & J. 415, 420.

(*f*) *Barton v. Barclay*, 1831, 7 Bing. p. 757; *Stukeley v. Butler*, 1615,

estate of the lessee by specifying the time of commencement, and the duration of the interest granted to him (*g*). But a valid grant in the premises—and a grant without any words of limitation gives an estate for life (*h*)—is not destroyed by an invalid limitation in the habendum (*i*); and, generally, the habendum may be controlled by other parts of the instrument, though this requires a strong case, and it must be quite clear that it could not have been the intention of the parties that the lessee should have the land for the term specified in the habendum (*k*).

The commencement of the term must be ascertained with certainty (*l*), but it will be sufficient if the date at which the lease is to commence is capable of being so ascertained at the time when the lease is to take effect in possession, though up to that time the period of commencement may be uncertain (*m*). Hence the term may be made to commence upon the performance of a condition—*e.g.* the payment of a sum of money by the lessee to the lessor (*n*)—or upon a default in making a payment (*o*). If a lease be granted for twenty-one years after three lives in being, though it is uncertain at first when the term will commence, because the lives are in being, yet when they die it is reduced to a certainty; and *id certum est quod certum reddi potest* (*p*).

Commence-
ment of term.

The term of years granted by a lease may be made to

Hob. pp. 170, 171; *Buckler's Case*, 1597, 2 Rep. 55 b; *Doe v. Steele*, 1843, 4 Q. B. p. 667.

(*g*) See *Bird v. Baker*, 1858, 1 E. & E. 12.

(*h*) Co. Litt. 42 a.

(*i*) *Boddington v. Robinson*, 1875, L. R. 10 Ex. 270.

(*k*) *Strickland v. Maxwell*, 1834, 2 Cr. & M. p. 549. As to correcting an inconsistency between the habendum and the reddendum by reference to the counterpart, see *Burchell v. Clark*, 1876, 2 C. P. D. 88, 93, 94; and as to rejecting an invalid limitation in the habendum—as an estate for life to begin *in futuro*—in favour of an estate mentioned in the premises, see *Goodtitle v. Gibbs*, 1826, 5 B. & C. 709; *Carter v. Madgwick*, 1693, 3 Lev. 339; *Boddington v. Robinson*, 1875, L. R. 10 Ex. 270.

(*l*) *Anon.*, 1675, 1 Mod. 180.

(*m*) *Shep. Touch.* 272; Co. Litt. 45 b; *Bishop of Bath's Case*, 1606, 6 Rep. 35 a.

(*n*) *Bishop of Bath's Case*, *supra*.

(*o*) *Clowes v. Hughes*, 1870, L. R. 5 Ex. 160.

(*p*) Per Lord Kenyon, C.J., in *Goodright v. Richardson*, 1789, 3 T. R. at p. 463. As to the commencement of a future term where a previous term to which it is postponed is surrendered or forfeited, see Co. Litt. 45 b; *Wrottesley v. Adams*, 1557, Dyer, 177 b, pl. 35; *Rector of Chedington's Case*, 1599, 1 Rep. p. 154 b.

commence either immediately, or from a past (*q*) or future day. Where an agreement for a yearly letting states the term as commencing *on* a specified date, as on the 19th May in a given year, this is reckoned as the first day of the term (*r*), and consequently notice to quit can be given for a subsequent 18th May (*r*); but where a term begins *from* a specified date, it lasts during the whole anniversary of that date (*s*). The effect of the word “from,” however, is not uniform, and where leases are made to commence from the day of the date of the instrument of lease, the word *from* is construed to mean either inclusive or exclusive, according to the context and subject-matter, and so as to carry out the intention of the parties and to effectuate their deeds (*t*).

A lease by deed made to commence from an event which has never happened, or from the date of the deed where the deed has either no date or an impossible date, takes effect from the time of the delivery of the deed (*u*). Leases to commence *from henceforth* begin from the delivery of the deed, and not from its date (*x*); and so do leases by deed in which no time is specified for the commencement of the term (*y*). But it seems that where an agreement not under seal which operates as a present demise states no commencement for the term, this commences from the date (*z*), unless a different intention appears (*a*); or, where possession has been taken, from the time of entry (*b*).

A lease made to begin after the end or determination of a previous lease, where there is no previous lease, or such previous lease has determined or become void, will begin immediately (*c*). A lease of land which is to begin at the

(*q*) See *Enys v. Donnithorne*, 1761, 2 Burr. 1190.

(*r*) *Sidebotham v. Holland*, 1895, 1 Q. B. 378.

(*s*) *Ackland v. Lutley*, 1839, 9 A. & E. p. 894.

(*t*) *Pugh v. Leeds*, 1777, 2 Cowp. 714, 717, 725; *Doe v. Day*, 1809, 10 East, 427. See *Wilkinson v. Gaston*, 1846, 9 Q. B. pp. 144, 145.

(*u*) Bac. Abr. (L.) 826; *Styles v. Wardle*, 1825, 4 B. & C. 908, 911.

(*x*) *Clayton's Case*, 1585, 5 Rep. 1. See *Steele v. Mart*, 1825, 4 B. & C. 272, 278; *Llewelyn v. Williams*, 1611, Cro. Jac. 258.

(*y*) Co. Litt. 46 b.

(*z*) *Doe v. Benjamin*, 1839, 9 A. & E. 644.

(*a*) *Sandill v. Franklin*, 1875, L. R. 10 C. P. 377. Cf. *Davis v. Jones*, 1856, 17 C. B. 625; as to executory agreements, see *supra*, p. 107.

(*b*) *Doe v. Matthews*, 1851, 11 C. B. 675.

(*c*) Co. Litt. 45 b; Bac. Abr. (L.) 829; *Miller v. Maynwaring*, 1635, Cro. Car. 397, 399.

termination of leases of parts, the existing leases being for different terms, will commence as to each part so soon as the term in it expires (*l*).

The habendum of a lease will be construed as taking effect from the time of the execution of the lease, though the duration of the term is to be computed from a prior day (*e*). Hence the interest of the lessee commences only from the day of the execution of the deed (*f*). The habendum of the lease can only be considered as marking the duration of the lessee's interest; its operation as a grant is merely prospective (*g*).

The duration of the lease must also be ascertained either by the express limitation of the parties at the time of making the lease, or by reference to some collateral or subsequent act or event which may with equal certainty measure the continuance thereof (*h*). A lease for an indefinite term is *primâ facie* a lease at will (*i*), but a general letting at a yearly rent usually gives rise to an implied tenancy from year to year (*i*). A lease for a definite term may be made determinable within the term, as upon the falling of a life (*k*)—a lease for ninety-nine years if A. so long lives (*l*)—or upon the lessee ceasing to occupy (*m*).

A lease which first creates a certain term and then adds a term which is uncertain, is valid for so much as is certain (*n*). The lease sometimes reserves an option for the lessee to take a further lease for stated periods (*o*), or

Duration of lease.

1. Term of years.

(*d*) *Windham's Case*, 1590, 5 Rep. 7 a.

(*e*) Per Parke, B., in *Jervis v. Tomkinson*, 1856, 1 H. & N. at p. 206.

(*f*) *Jervis v. Tomkinson*, 1856, 1 H. & N. 195; *Shaw v. Kay*, 1847, 1 Ex. 412; *Cooper v. Robinson*, 1842, 10 M. & W. p. 696.

(*g*) *Wyburd v. Tuck*, 1799, 1 B. & P. 464.

(*h*) *Shep. Touch.* 274; *Co. Litt.* 45 b; *Bac. Abr.* (L. 3) 835; *Bishop of Bath's Case*, 1606, 6 Rep. at pp. 35, 35 a. *Supra*, p. 99.

(*i*) *Supra*, p. 92.

(*k*) *Shep. Touch.* 274. *Cf. Wright v. Cartwright*, 1757, 1 Burr. 282; and as to evidence of life of *cestui que vie*, see *Rundle v. Lory*, 1837, 6 A. & E. 218.

(*l*) For examples of such limitations, see *Daniel v. Waddington Hill*, 1616, Cro. Jac. 377; *Truepenney's Case*, 1590, cited in *Lord Vaux's Case*, 1593, Cro. Eliz. 269; *Co. Litt.* 225 a.

(*m*) *Doe v. Clarke*, 1807, 8 East, 185; and see *Wrenford v. Giles*, 1599, Cro. Eliz. 643.

(*n*) *Say v. Smith*, 1565, Plowden, p. 271; *Gwynne v. Mainstone*, 1828, 3 C. & P. 302.

(*o*) See *Waring v. King*, 1841, 8 M. & W. 571; *Christy v. Tancred*, 1840, 7 M. & W. 127.

provides for the tenancy to continue subject to notice (*p*). An assignment of the residue of a term which has in fact merged may operate as the creation of a new term for a corresponding period (*q*).

2. From year to year.

Where it is intended to create an express tenancy from year to year the words of the habendum should be *from year to year*. A lease *for one year certain, and so on from year to year*, has been held to contemplate a tenancy for two years at the least (*r*). A letting *not for one year only, but from year to year*, enures as a demise for two years at least (*s*). A lease *for a year, or for one year and no longer*, creates a tenancy expiring at the end of the year without notice to quit (*t*).

3. For life.

A lease for life of corporeal hereditaments could not by the common law be made to commence *in futuro*, because livery of seisin was formerly essential to the creation of an estate of freehold, and present livery could not be made in respect of a future estate (*u*); hence a lease to A. *habendum* from a future date for the life of A. or any other person was void (*x*), and though livery of seisin is not now necessary, and a freehold estate may be created by deed (*y*), yet the rule still holds. Inasmuch, however, as a use may be limited *in futuro*, a lease for life may be made to commence at a future day by limitations operating under the Statute of Uses, as, for instance, where the lease is made in pursuance of a power to lease (*z*).

A lease for term of life, without mentioning for whose life, is deemed to be for the life of the lessee; but if the lessor

(*p*) *Brown v. Trumper*, 1858, 26 Beav. 11.

(*q*) *Cottee v. Richardson*, 1851, 7 Ex. 143.

(*r*) *Doe v. Green*, 1839, 9 A. & E. 658; *Doe v. Geekie*, 1844, 5 Q. B. 841. See *Reg. v. Chawton*, 1841, 1 Q. B. 247; Bac. Abr. (L.) 838.

(*s*) *Denn v. Cartwright*, 1803, 4 East, 29, 33; Bac. Abr. (L.) 836; *Bishop of Bath's Case*, 1606, 6 Rep. p. 36 a; but see *Harris v. Evans*, 1756, Amb. 329.

(*t*) *Cobb v. Stokes*, 1807, 8 East, 358. See judgment in *Messenger v. Armstrong*, 1785, 1 T. R. at p. 54; also judgment in *Right v. Darby*, 1786, *ib.* at p. 162.

(*u*) *Barwick's Case*, 1598, 5 Rep. at p. 94 b; 2 Black. Com. 165. See *Greenwood v. Tyber*, 1620, Cro. Jac. 563; *Freeman v. West*, 1763, 2 Wils. 165.

(*x*) *Buckler's Case*, 1597, 2 Rep. 55 b; *Hogg v. Crosse*, 1592, Cro. Eliz. 254.

(*y*) 8 & 9 Vict. c. 106, s. 2. *Supra*, p. 125.

(*z*) 1 Sanders on Uses (5th ed.), 142; 1 Platt on Leases, 692.

might lawfully grant a lease for the term of his own life, but not for the term of the life of the lessee, such a lease will be taken to be for the former term (*a*). A lease made to A. during the life of B. and C. will continue during the life of the survivor (*b*); but a lease for a term of years if A. and B. shall so long live will determine on the death of one of them (*b*). A lease for the lives of A., B. and C., where C. is not in being, is good for the lives of A. and B. (*c*).

A yearly letting with a provision that the lessee shall not be disturbed so long as the rent is duly paid (*d*), is equivalent to a lease for the life of the lessee and is void at law unless made by deed (*e*); neither, it seems, will effect be given to it in equity (*f*). But in Ireland it is otherwise, since a freehold interest can be created by note in writing signed by the lessor (*g*). If the lease is from year to year so long as the rent is paid, and as the lessor has power to let the premises, this last condition makes the lease void for uncertainty (*h*).

Letting to continue while rent paid.

Where there is no present demise, but simply an executory agreement under which the lessee is to have a lease, and is not to be disturbed so long as the rent is paid, the rule is different, and in equity the lessee is entitled to a life tenancy, subject to payment of rent (*i*), or for so long as the lessor's interest permits (*i*). Where the lessor has a leasehold interest, the lessee is entitled to an underlease for the residue of the term less one day, should he so long live (*k*).

Executory agreement.

(*a*) Co. Litt. 42 a. For effect of a demise by A. to B. for the term of his life, see per Taunton, J., in *Doe v. Dodd*, 1833, 5 B. & Ad. p. 693.

(*b*) *Brudnel's Case*, 1593, 5 Rep. 9 a; Bac. Abr. 842; *Hughes and Crowther's Case*, 1610, 13 Rep. 66. See *Doe v. Smith*, 1805, 6 East, 530.

(*c*) *Doe v. Edwards*, 1836, 1 M. & W. 553; and see *Coates v. Collins*, 1871, L. R. 7 Q. B. 144.

(*d*) Where the tenant is in possession and the landlord agrees not to raise his rent, such agreement is personal and will not bind a purchaser without notice: *Roberts v. Tregaskis*, 1878, 38 L. T. 176.

(*e*) *Doe v. Browne*, 1807, 8 East, 165; *Browne v. Warner*, 1807, 14 Ves. 156, 409; *Cheshire Lines Committee v. Lewis*, 1880, 50 L. J. Q. B. 121.

(*f*) See per Brett, L.J., in *Cheshire Lines Committee v. Lewis*, loc. cit.

(*g*) Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict. c. 154), s. 4; *Wood v. Davis*, 1880, 6 L. R. Ir. 50.

(*h*) *Wood v. Beard*, 1876, 2 Ex. D. 30.

(*i*) *Re King's Leasehold Estates*, 1873, 16 Eq. 521; *Mardell v. Curtis*, 1899, 43 Sol. Journ. 587.

(*k*) *Kusel v. Watson*, 1879, 11 C. D. 129.

RESERVATION OF RENT.

Reddendum.

The REDDENDUM (*l*) fixes the amount and kind of recompense to be paid by the lessee to the lessor for the possession of the demised premises, and usually specifies the periods at which such recompense is to be paid or rendered.

Distress is a necessary incident to rent, and rent can only be reserved out of lands or tenements whereto the lessor may have recourse to distrain (*m*). Hence it cannot be reserved out of incorporeal hereditaments (*m*). The rent reserved for the whole land becomes due out of every part of it (*n*). On one lease several yearly rents may be reserved (*o*).

No special form of words is essential for reservation of rent. A proviso (*p*), or a covenant (*q*), may constitute a good reservation, and a letting *at and under the rent of 80l.* is an agreement by the tenant to pay that rent (*r*). Under the words *yielding and paying or rendering* a covenant for payment of the rent is implied (*s*).

Rent payable in advance.

Rent may be made payable in advance, but in that case the reddendum should state expressly that the rent is so payable *from time to time*, or *during the term*, in advance, or the stipulation for payment in advance may be held to relate to the first quarter's rent only (*t*). And sometimes it may be advisable to make the last quarter's or half-year's rent payable in advance, so as to enable the lessor to distrain for it before the expiration of the lease (*u*).

Times of payment.

The times of payment of the rent—*i.e.* quarterly or half-yearly—should be mentioned in the reddendum. If no times of payment are specified, the rent will be payable at

(*l*) Co. Litt. 142 a. As to the effect of a memorandum added to the lease allowing a deduction from the rent, see *Davies v. Stacey*, 1840, 12 A. & E. 506.

(*m*) Co. Litt. 47 a.

(*n*) *Curtis v. Spitty*, 1835, 1 Bing. N. C. p. 760 ; *Hargrave v. Shewin*, 1826, 6 B. & C. 34.

(*o*) *Knight's Case*, 1588, 5 Rep. 54 b.

(*p*) *Harrington v. Wise*, 1597, Cro. Eliz. 486.

(*q*) *Drake v. Munday*, 1631, Cro. Car. 207.

(*r*) *Doe v. Kneller*, 1829, 4 C. & P. 3.

(*s*) *Iggulden v. May*, 1804, 9 Ves. at p. 330 ; *Giles v. Hooper*, 1691, Carth. 135 ; *Hellier v. Casbard*, 1666, 1 Sid. 266 ; *Porter v. Swetnam*, 1654, Styles, 406.

(*t*) See *Holland v. Palser*, 1817, 2 Stark. 161 ; *Hopkins v. Helmore*, 1838, 8 A. & E. 463.

(*u*) *Witty v. Williams*, 1864, 12 W. R. 755.

the end of the year (*x*). The days of payment should also be specified, and the day first mentioned should be that on which the first payment of rent is to be made (*y*); but although this is not so, the first payment will nevertheless be deemed to become due on such one of the days specified as first occurs (*z*). Rent reserved payable half-yearly or quarterly, without mention of the days of payment, will be payable in equal portions on half-yearly or quarterly days computed from the commencement of the term (*a*).

The amount of the rent must be either expressly stated, or otherwise rendered capable of being ascertained with certainty (*b*); and it is certain if by calculation and on the happening of certain events it becomes certain (*c*). Thus a man may hold of his lord to shear all the sheep depasturing within his lord's manor; and this is certain enough, although the lord has sometimes a great, and sometimes a small number there (*d*). A royalty of so much quarterly per solid yard for marl got, and so much per thousand for all bricks made by the tenant, is a rent capable of being ascertained with certainty (*e*). A rent varying with the price of wheat, such price to be ascertained in a specified manner, is good (*f*); and so is a rent of part of a room with steam power, subject to deduction at the rate of the rent for the days when the steam power is not available (*g*).

Certainty as to amount of rent.

In mining leases it is usual to reserve a fixed or dead rent and also a royalty upon a certain weight or area of minerals got, with a provision enabling the lessee to get, without paying any royalty, so much mineral as at the royalty reserved would produce the fixed or dead rent (*h*).

Rent in mining leases.

(*x*) *Cole v. Sury*, 1627, Latch. 264; *Coomber v. Howard*, 1845, 1 C. B. 440; *Turner v. Allday*, 1836, Tyr. & Gr. 819; *Collett v. Curling*, 1847, 10 Q. B. 785.

(*y*) See *Hutchins v. Scott*, 1837, 2 M. & W. 809.

(*z*) *Hill v. Grange*, 1557, Plowd. p. 171; Co. Litt. 217 b.

(*a*) *Tomkins v. Pinsent*, 1702, 2 Ld. Raym. 819. See *Harrington v. Wise*, 1597, 2 Rol. Abr. 450.

(*b*) Co. Litt. 142 a. See *Parker v. Harris*, 1693, 1 Salk. 262.

(*c*) Per Brett, L.J., in *Ex parte Voisey*, 1882, 21 C. D. p. 458.

(*d*) Co. Litt. 96 a.

(*e*) *Daniel v. Gracie*, 1844, 6 Q. B. 145. See *Watson v. Waud*, 1853, 8 Ex. at p. 339.

(*f*) *Kendall v. Baker*, 1852, 11 C. B. 842.

(*g*) *Selby v. Greaves*, 1868, L. R. 3 C. P. 594.

(*h*) See *Jegon v. Vivian*, 1865, L. R. 1 C. P. p. 34; *Clayton v. Penson* (H. L.) W. N. 1878, p. 158.

Mode of
reservation.

The rent, if reserved to any specified person, should be reserved to the person who leases (*k*) or purports to lease (*l*) the land out of which it issues, and not to a stranger; but though rent reserved to a stranger does not go with the reversion and cannot be distrained for, the reservation is good by way of contract (*m*). It has been said that the law will use all the industry imaginable to conform the reservation to the estate (*n*). Hence a reservation to the lessor, entitled in fee, his heirs, *executors*, and assigns will not prevent the rent from following the reversion and going to the heir (*o*).

But the most clear and sure mode of reservation is to reserve rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person (*p*); and now under sect. 10 of the Conveyancing Act, 1881, rent reserved by a lease goes with the reversionary estate in the land (*q*). A reservation of rent to the lessor only, or to the lessor, his executors, and assigns, not mentioning his heirs, will enure only during the life of the lessor (*r*), unless the reservation be expressly to the lessor *during the term*, in which case rent will continue payable to the end of the term (*s*).

"Net rent."

A stipulation for a *net rent* means a rent clear of all deductions (*t*); hence the tenant under a lease containing this reservation will be liable to pay land tax and sewer's rates (*t*).

COVENANTS.

Covenant, how
constituted.

A COVENANT is nothing more than an agreement of the parties under seal (*u*). Hence, in order to constitute a

(*k*) Co. Litt. 143 b; Litt. s. 346; *Oates v. Frith*, 1615, Hob. 130. See *Cole v. Sury*, 1627, Latch. 264.

(*l*) As to leases by estoppel, see *supra*, p. 74.

(*m*) *Jewel's Case*, 1587, 5 Rep. 3 a. See *Deering v. Farrington*, 1674, 1 Mod. 113.

(*n*) Judgment in *Sacheverell v. Froggatt*, 1671, 1 Vent. at p. 162.

(*o*) *Drake v. Munday*, 1631, Cro. Car. 207. See *Sacheverell v. Froggatt*, 2 Wms. Saund. 367 a. And see *supra*, p. 61, as to real representatives.

(*p*) *Whitlock's Case*, 1609, 8 Rep. at p. 71 a.

(*q*) *Infra*, p. 416. Cf. *Beer v. Beer*, 1852, 12 C. B. 60.

(*r*) Co. Litt. 47 a; *Wootton v. Edwin*, 1608, 12 Rep. 36.

(*s*) *Sacheverell v. Froggatt*, 2 Wms. Saund. 367 a.

(*t*) See judgment of Lord Tenterden, C.J., in *Bennett v. Womack*, 1828, 7 B. & C. at p. 629, 3 C. & P. 96; *Bradbury v. Wright*, 1781, 2 Dougl. 624; *Giles v. Hooper*, 1691, Carth. 135. See *infra*, p. 151.

(*u*) Per Lord Ellenborough, C.J., in *Randall v. Lynch*, 1810, 12 East, at p. 182. Cf. *Hayne v. Cummings*, 1864, 16 C. B. N. S. p. 426.

covenant, no technical language is necessary (*x*); any words in a deed which show an agreement to do or not to do a thing amount to a covenant (*y*). A recital (*z*), or an exception (*a*), may constitute a covenant, if there can be collected from it an agreement that a thing should be done or should not be done (*b*). And a covenant may be implied from the provisions of the lease, if this is necessary in order to secure for them full effect (*c*). Every obligation which, on the fair construction of the language of a deed, is clearly imposed on one of the parties is equivalent to an express covenant by him to perform that obligation (*d*).

An express covenant for payment of rent is always inserted in leases by deed, the advantage of its insertion being that, unlike the implied covenant (*e*) arising from the words "yielding and paying," it binds the lessee to pay rent, although he does not enter, and, after he has assigned the lease, renders him, as well as the assignee, liable for payment of rent (*f*). If it is agreed that the rent shall cease to be payable, or shall be suspended, in case the demised premises shall be burnt down, or shall become uninhabitable, an express exception or provision to that effect should be inserted in the covenant for payment of rent. An exception of damage by fire contained in the covenant to repair does not limit the operation of the covenant for payment of rent (*g*).

Covenant for payment of rent.

(*x*) *Brookes v. Drysdale*, 1877, 3 C. P. D. p. 58; *Wolveridge v. Steward*, 1833, 1 Cr. & M. p. 657; *Wood v. Copper Miners' Co.* 1849, 7 C. B. 906; *Lant v. Norris*, 1757, 1 Burr. 287, 290. See also *Saltoun v. Houstoun*, 1824, 1 Bing. at p. 440.

(*y*) *Easterby v. Sampson*, 1830, 6 Bing. 644, 650, 9 B. & C. 505; *Stevinson's Case*, 1589, 1 Leon. 324, 12 East, 182, note (*a*); *Hollis v. Carr*, 1677, 2 Mod. 87; *Duke of St. Albans v. Ellis*, 1812, 16 East, 352; *Cannock v. Jones*, 1849, 3 Ex. 233.

(*z*) *Sampson v. Easterby*, 1830, 9 B. & C. 505, 6 Bing. 644; *Farrall v. Hilditch*, 1859, 5 C. B. N. S. 840; *Lay v. Mottram*, 1865, 19 C. B. N. S. 479.

(*a*) *D. of St. Albans v. Ellis*, *supra*.

(*b*) *D. of St. Albans v. Ellis*, *ubi supra*, p. 355.

(*c*) As to a covenant to burn lime being implied from a covenant to supply lime at certain seasons, see *Earl of Shrewsbury v. Gould*, 1819, 2 B. & A. 487. *Cf. Doe v. Guest*, 1846, 15 M. & W. 160.

(*d*) *Per Rigby, L.J., Re Cadogan Estate Lim.*, 1895, 73 L. T. p. 390.

(*e*) *Supra*, p. 146.

(*f*) *Infra*, p. 410.

(*g*) *Hure v. Groves*, 1796, 3 Anst. 687. See *infra*, p. 207.

“Usual covenants” (*h*).

Where an agreement for a lease specifies only the essential terms above mentioned (*i*), and either mentions no other terms, or provides that the lease shall contain the “usual provisions” (*k*), the parties are entitled to have inserted in the lease made in pursuance of the agreement such other provisions as are usual in leases of property of the same character as that agreed to be leased (*l*), and in the same district (*m*); not being provisions which tend to abridge or qualify the legal incidents of the estate agreed to be granted to the lessee (*n*). Since a covenant against assigning or underletting without consent (*o*), and a proviso for re-entry for breach of any of the covenants in the lease, or upon bankruptcy of the lessee (*p*), tend to abridge or qualify the legal incidents of the estate agreed to be granted to the lessee, the lessor cannot require the insertion in the lease of either of these provisions.

The question whether a provision is usual is one of fact (*q*), to be decided either upon an examination of the provisions contained in the leading books of precedents (*q*), or from the evidence of witnesses familiar with the usual contents of leases of the description of that agreed to be

(*h*) See articles in 27 Sol. Journ. pp. 129, 142, 159, 177, and letter at p. 211.

(*i*) *Supra*, p. 106.

(*k*) The same construction is adopted in both these cases. See *Church v. Brown*, 1808, 15 Ves. p. 271; but see *Colhoun v. Trustees of Foyle College*, 1898, 1 I. R. 233.

(*l*) See *Bennett v. Womack*, 1828, 7 B. & C. 627; *Hampshire v. Wickens*, 1878, 7 C. D. at p. 561.

(*m*) *Church v. Brown*, 1808, 15 Ves. p. 267; *Willbraham v. Livesey*, 1854, 18 Beav. p. 210; *Strelley v. Pearson*, 1880, 15 C. D. 113. See *Hodgkinson v. Crowe*, 1875, 19 Eq. 591.

(*n*) *Church v. Brown*, 1808, 15 Ves. pp. 264, 265; *Blakesley v. Whieldon*, 1841, 1 Hare, 176. The observations of Lord Eldon in *Church v. Brown* were cited and approved in *Hodgkinson v. Crowe*, 1875, 10 Ch. p. 625.

(*o*) *Henderson v. Hay*, 1792, 3 Bro. C. C. 632; *Church v. Brown*, 1808, 15 Ves. 258; *Hodgkinson v. Crowe*, 1875, L. R. 19 Eq. 591; *Hampshire v. Wickens*, 1878, 7 Ch. D. 555.

(*p*) *Hodgkinson v. Crowe*, 1875, 19 Eq. 591, 10 Ch. 622. It was held, however, before this decision of the Court of Appeal, that a proviso for re-entry if any business but that of a licensed victualler was carried on (*Bennett v. Womack*, 1828, 7 B. & C. 627), or on bankruptcy (*Haines v. Burnett*, 1859, 27 Beav. 500), was usual in leases of public-houses.

(*q*) *Hampshire v. Wickens*, 1878, 7 C. D. 555; *Brookes v. Drysdale*, 1877, 3 C. P. D. 52. The question seems to have been originally considered one of law: see *Henderson v. Hay*, 1792, 3 Bro. C. C. 632.

granted (r). This being so, it is obvious that the "usual provisions" of a lease may vary in different generations (s), and the older decisions on this subject may not afford a trustworthy guide at the present day. The following provisions may probably be considered to be usual:—

COVENANT by lessee *to pay rent* (t).

COVENANT by lessee *to pay taxes*, except such as are ultimately charged by the Legislature on the landlord (u). A covenant by the lessee to pay "land tax, sewers' rate, and all taxes" is usual in a lease reserving a net rent (x). By the custom of the district under an agreement for the lease of a farm "on the usual terms," the land tax may (and formerly the tithe rent charge might) fall on the tenant (y).

COVENANT by lessee *to keep and deliver up premises in repair* (z).

PROVISION in a lease of buildings enabling the lessor *to enter and view the state of repair* (a). In a mining lease a reservation of liberty to the lessor, his agents and workmen, to examine the workings has been held to be a provision which "the contract, without any express stipulation will carry *in gremio*," since it is necessary to protect the interest of the lessor (b); and the ordinary right to enter and view seems to stand on the same footing.

PROVISO for *re-entry on non-payment of rent* (c).

(r) As in *Hodgkinson v. Crowe*, 1875, 19 Eq. 591. See *Hart v. Hart*, 1881, 18 C. D. 670, where conveyancers were called to speak to the usual practice.

(s) *Hampshire v. Wickens*, 1878, 7 C. D. p. 561.

(t) See *Taylor v. Horde*, 1757, 1 Burr. p. 125; 5 Dav. Prec. 3rd ed. Part I. p. 53; 3 Byth. & Jarm. 4th ed. by Robbins, p. 117.

(u) 5 Dav. Prec. Part I. p. 53; 3 Byth. & Jarm. p. 117.

(x) *Bennett v. Womack*, 1828, 7 B. & C. 627, 3 C. & P. 96.

(y) See *Parish v. Steeman*, 1860, 1 D. F. & J. pp. 328, 332.

(z) *Sharp v. Milligan*, 1857, 23 Beav. p. 422; *Doe v. Withers*, 1831, 2 B. & Ad. p. 903. Apparently the words "reasonable wear and tear excepted," cannot be required to be inserted as a usual provision at the end of this covenant: 27 Sol. Journ. p. 177.

(a) 5 Dav. Prec. Part I. p. 53, cited by Jessel, M.R., in *Hampshire v. Wickens*, 7 C. D. p. 561.

(b) *Blakesley v. Whieldon*, 1841, 1 Hare, 176.

(c) See *Hodgkinson v. Crowe*, 1875, 10 Ch. p. 626.

The usual qualified covenant by the lessor *for quiet enjoyment* (d).

In the case of leases of particular kinds of property other provisions may be required to be inserted. Thus in an agricultural lease such covenants as to cultivation as are usually inserted in leases of land in the neighbourhood may be required. In such a lease a covenant not to mow meadow land more than once a year seems to be a usual covenant (e). No doubt also a reservation of an additional rent for every acre of old pasture land ploughed up may be required to be inserted, since such a reservation is certainly usual, and as it only enforces the lessee's duty to abstain from committing waste, it does not qualify or abridge the legal incidents of the estate agreed to be granted to the lessee. So also in public-houses it has been said that the "usual covenants" mean the covenants always inserted in such leases (f), and in mining leases such provisions will be inserted as are usual in such leases in the district in which the demised property is situate (g).

Stipulations
which are
not "usual."

The following provisions have been held not to be usual :—

PROVISO suspending payment of rent in case the premises are destroyed by fire or tempest (h).

Exception from the covenant to repair of damage by fire or tempest (i) ; and even though this exception is admitted by the lessor, the lessee cannot add the words "or other casualty," these being uncertain (k).

COVENANT by lessee to rebuild and repair (l).

COVENANT by lessee not to assign or underlet without

(d) *Hampshire v. Wickens*, 1878, 7 C. D. p. 561. See *Hall v. City of London Brewery Co.*, 1862, 31 L. J. Q. B. 257. As to covenants for title in Ireland, where special provision for such covenants exists under the Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict. c. 154), see *Colhoun v. Trustees of Foyle College*, 1898, 1 I. R. 233.

(e) See *Hyde v. Warden*, 1877, 3 Ex. D. p. 82.

(f) *Hampshire v. Wickens*, 1878, 7 C. D. p. 561. See *Bennett v. Womack*, 1828, 7 B. & C. 627, and note (p), p. 150, *supra*.

(g) See *Hodgkinson v. Crowe*, 1875, 19 Eq. 591.

(h) *Doe v. Sandham*, 1787, 1 T. R. 705.

(i) *Sharp v. Milligan* (No. 2), 1857, 23 Beav. 419 ; *Kendall v. Hill*, 1860, 6 Jur. N. S. 968.

(k) *Crosse v. Morgan*, 1889, 60 L. T. 703.

(l) *Doe v. Withers*, 1831, 2 B. & Ad. p. 903.

licence (*m*). The reason why such covenants are not inserted has been already stated (*n*). The fact that the subject-matter of the lease is a public-house (*o*), or that the lease is a mining lease (*p*), makes no difference.

CONDITION that any underlease or deed of assignment of the lease shall be registered with the lessor's solicitor and a fee paid to him (*q*).

COVENANT by the lessee not to exercise a particular trade upon the demised premises (*r*); at all events where the premises are in a neighbourhood where trade is usually carried on (*s*). But in a lease of a public-house a covenant against carrying on any trade except that of a licensed victualler or beer—housekeeper is usual (*t*). It has been thought that in localities where trade is not carried on the insertion of a covenant against converting the house demised into a shop might perhaps be insisted on (*s*).

COVENANT by a lessee to carry on a particular trade on the premises (*u*), except in the case of a lease of a public-house (*x*).

COVENANT by the lessee in a lease of a public-house to reside on the premises and personally conduct the business (*o*).

COVENANT by the lessee to insure (*z*).

PROVISION in a lease of a colliery that the lessee shall be

(*m*) *Henderson v. Hay*, 1792, 3 Bro. C. C. 632; *Church v. Brown*, 1808, 15 Ves. 528; *Hampshire v. Wickens*, 1878, 7 C. D. 555; *Buckland v. Papillon*, 1866, 1 Eq. p. 482, 2 Ch. p. 71; *Bishop v. Taylor*, 1891, 60 L. J. Q. B. 556.

(*n*) *Supra*, p. 150, n. (*p*).

(*o*) *Re Lander and Bagley's Contract*, 1892, 3 Ch. 41.

(*p*) *Hodgkinson v. Crowe*, 1875, L. R. 19 Eq. 591.

(*q*) *Brookes v. Drysdale*, 1877, 3 C. P. D. 52.

(*r*) *Proper v. Parker*, 1832, 3 My. & K. 280. See *Van v. Corpe*, 1834, *ib.* 269.

(*s*) *Wilbraham v. Livesey*, 1854, 18 Beav. p. 210.

(*t*) See *Bennett v. Wonnuck*, 1828, 7 B. & C. 627.

(*u*) *Doe v. Guest*, 1846, 15 M. & W. 160.

(*x*) See *supra*, p. 150, n. (*p*).

(*z*) This seems to have been admitted to be unusual in *Cosser v. Collinge*, 1832, 3 My. & K. 283. See also 5 Dav. Prec. 3rd ed. Part I. p. 53, note. Though having regard to actual practice, the covenant might now be held to be usual.

entitled to determine the lease when the mine is incapable of being worked at a profit (*a*).

COVENANT that in case the demised premises shall be blown down or burned, the lessor shall rebuild, or otherwise the tenant shall be at liberty to quit (*b*).

PROVISO for re-entry on breach of any covenant (*c*). The rule on this head has not been altered by sect. 14 of the Conveyancing Act, 1881 (*d*).

A PROVISO for re-entry in case the lessee shall become bankrupt or make any composition with his creditors or if execution should issue against him is, it seems, unusual and unreasonable (*e*).

“ Proper
covenants.”

An agreement for a lease to contain “ proper covenants ” justifies the insertion only of such covenants as are calculated to secure the full effect of the contract (*f*), and ordinarily a covenant against assignment or underletting will not be included (*g*).

The question what are usual and proper covenants can be determined on a summons under the Vendor and Purchaser Act, 1874 (*d*).

Construction
of covenants.

Every covenant is to be expounded with a regard to its context, and such exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words (*i*). Hence, if a man acts contrary to the intention of his covenant a breach will be committed, although he literally performs it; as, if a man covenants to leave all the trees upon the land, and he cuts them down and leaves them there (*k*). If the meaning of the words of a covenant be

(*a*) *Strelley v. Pearson*, 1880, 15 C. D. 113, 118.

(*b*) *Doe v. Sandham*, 1787, 1 T. R. 705; *Medwin v. Sandham*, 1789, 3 Swanst. 685.

(*c*) *Hodgkinson v. Crowe*, 1875, 10 Ch. 622.

(*d*) *Re Auderton and Milner's Contract*, 1890, 45 C. D. 476.

(*e*) *Hyde v. Warden*, 1877, 3 Ex. D. p. 82; *Hodgkinson v. Crowe*, 1875, 19 Eq. 591.

(*f*) *Jones v. Jones*, 1806, 12 Ves. 186.

(*g*) *Eadie v. Addison*, 1882, 52 L. J. Ch. 80.

(*i*) Per Lord Ellenborough, C.J., in *Iggulden v. May*, 1806, 7 East, at p. 241.

(*k*) Com. Dig. *Covenant* (E. 2). As to the construction of a covenant to make roads on a building estate, see *Mason v. Cole*, 1849, 4 Ex. 375.

doubtful, such construction will be made as is most strong against the covenantor (*l*).

When two parties enter into mutual covenants such covenants may be either dependent or independent. When the covenants are independent, each party may sue upon the covenant of the other without any reference to the question whether he has performed his own covenant; when the covenants are dependent, the performance of his own covenant will be treated as a condition precedent to his right to sue upon the covenant of the other.

Whether
dependent
or indepen-
dent.

Covenants are construed as dependent or independent, according to the fair intention of the parties, to be collected from the instrument, and technical words (if there be any to encounter such intention) should give way to that intention (*m*). As furnishing a guide to the discovery of the intention of the parties (*n*), it has been laid down that where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant (*o*).

As a general rule covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor (*p*). And the covenants are independent when some of the stipulations on one side are not to be performed till the covenant on the other side is exhausted (*q*).

Where there is a power for the lessee to put an end to the lease by notice (all arrears of rent being paid and all the covenants on his part being performed), it seems, though the House of Lords was equally divided on the question, that the performance of the covenants is a condition precedent to the right to determine the

Conditions
precedent.

(*l*) *Bac. Abr. Covenant* (F.); judgment in *Doe v. Stevens*, 1832, 3 B. & Ad. at p. 303; *Love v. Pares*, 1810, 13 East, p. 87. See *Rhodes v. Bullard*, 1806, 7 East, 116.

(*m*) See judgment of Lord Kenyon, C.J., in *Porter v. Shephard*, 1796, 6 T. R. at p. 668; judgment of Lord Chelmsford in *Roberts v. Brett*, 1865, 11 H. L. C. p. 354.

(*n*) Per Lord Chelmsford, 11 H. L. C. p. 354.

(*o*) *Boone v. Eyre*, 1777, 1 H. Bl. 273, note (*a*); *St. Albans v. Shore*, 1789, *ib.* 270; Notes to *Portage v. Cole*, 1669, 1 Wms. Saund. 320 b; *Carpenter v. Cresswell*, 1827, 4 Bing. 409, 411. See *Baggallay v. Pettit*, 1859, 5 C. B. N. S. 637. See also *infra*, Chap. IV. sect. 2 (2), p. 318.

(*p*) *Newson v. Smythies*, 1858, 3 H. & N. p. 843, per Pollock, C.B.

(*q*) *Newson v. Smythies*, 3 H. & N. 840.

lease (r). More recently it has been held that where there is a covenant for renewal of the lease in case the lessee's covenants have been duly performed, the performance of the covenants is a condition precedent to renewal (s). But the covenant for quiet enjoyment is independent of the covenants for payment of rent and to repair (t). Where a sub-lessor covenants to indemnify his sub-lessee against non-payment of the head-rent, payment by the sub-lessee of his own rent is not a condition precedent (u).

Whether
joint or
several.

Covenants entered into with several persons will be construed as joint or several according as the interest of the parties is joint (x) or several (y), if the words of the covenant are capable of such a construction; but this rule will give way to the expressed intention of the parties that the covenants shall be joint or several (z). Words showing that a covenant is meant to be joint and several may govern the construction of subsequent covenants (a).

In a lease to G. and A., their executors, administrators, and assigns, as tenants in common and not as joint tenants, there were covenants by G. and A. for themselves, their executors, administrators, and assigns, that they or some or one of their executors, administrators, or assigns would pay the rent and keep the premises in repair. It was held that these covenants were joint, although the

(r) *Grey v. Friar*, 1854, 4 H. L. C. 565; *Porter v. Shephard*, 1796, 6 T. R. 665.

(s) *Finch v. Underwood*, 1876, 2 C. D. 310; *Bastin v. Bidwell*, 1881, 18 C. D. 238.

(t) *Dawson v. Dyer*, 1833, 5 B. & Ad. 584; *Edge v. Boileau*, 1885, 16 Q. B. D. 117.

(u) *Briant v. Pilcher*, 1855, 16 C. B. 354. See further as to conditions precedent, *Doe v. Kennard*, 1848, 12 Q. B. 244; *Bagulley v. Pettit*, 1859, 5 C. B. N. S. 637; and as to valuation being a condition precedent, *Babbage v. Coulburn*, 1882, 9 Q. B. D. 235; affirmed, 52 L. J. Q. B. 50; *Scott v. Avery*, 1856, 5 H. L. C. 811; *Dawson v. Fitzgerald*, 1876, 1 Ex. D. 257.

(x) See *Pugh v. Stringfield*, 1857, 3 C. B. N. S. 2; *Bradburne v. Botfield*, 1845, 14 M. & W. 559.

(y) See *Withers v. Bircham*, 1824, 3 B. & C. 254; *Servante v. James*, 1829, 10 B. & C. 410; *James v. Emery*, 1818, 8 Taunt. 245.

(z) *Shep. Touchst.* 166; per Parke, B., in *Sorsbie v. Park*, 1843, 12 M. & W. at p. 158; *Bradburne v. Botfield*, 1845, 14 M. & W. 559, 572; *Keightley v. Watson*, 1849, 3 Ex. 716, 722. See *Slingsby's Case*, 1589, 5 Rep. 18 a; *Eccleston v. Clipsham*, 1668, 1 Wms. Saund. 153; *Anderson v. Martindale*, 1801, 1 East, 497.

(a) *D. of Northumberland v. Errington*, 1794, 5 T. R. 522; *Copland v. Laporte*, 1835, 3 A. & E. 517.

tenancy was in common (*b*) ; and they are clearly joint where the tenancy is joint (*c*). A covenant with two persons and every of them is joint although the two are several parties to the deed (*d*). A covenant by two joint lessees, if it be joint and several, binds the representatives of a deceased lessee (*e*).

It has been held, that where a demise is joint, and the covenants upon which an action is brought are entire, and are made with both the lessors, the cause of action is joint, and both of the covenantees ought to sue, though as between themselves their interests may be separate (*f*). Hence, the benefit of a covenant to repair in a joint lease made by tenants in common, will run with the entire reversion, and the representatives of all the tenants in common must join in suing for a breach of such covenant (*g*). But where the covenant is originally with a single lessor, and the reversion devolves upon several as tenants in common, any one can sue for a breach of the covenant without joining the rest (*h*). In an action against five defendants who were jointly and severally liable as assignees of a lease, it was held not to be necessary to join the trustees of two defendants who were bankrupt (*i*). Under sect. 60 of the Conveyancing Act, 1881 (*k*), the benefit of a covenant made after 31st December, 1881, with two or more jointly, devolves, if a contrary intention is not expressed, on the survivor.

Parties to actions upon covenants.

Before the Conveyancing Act, 1881, came into operation, it was desirable, where it was intended that the liability to perform the covenants in the lease should pass with the land to an assignee of the lease that the lessee should be expressed to covenant for himself and his assigns; for though some covenants would bind assigns though not

Where assigns should be named.

(*b*) *White v. Tyndall*, 1888, 13 A. C. 263.

(*c*) *Levy v. Sale*, 1877, 37 L. T. 709.

(*d*) *Southcote v. Hoare*, 1810, 3 Taunt. 87.

(*e*) *Enys v. Donnithorne*, 1761, 2 Burr. 1190 ; *Burns v. Bryan*, 1887, 12 A. C. 184.

(*f*) Per Lord Denman, C.J., in *Foley v. Addenbrooke*, 1843, 4 Q. B. at p. 207.

(*g*) *Thompson v. Hakewill*, 1865, 19 C. B. N. S. 713.

(*h*) *Roberts v. Holland*, 1893, 1 Q. B. 665.

(*i*) *Lloyd v. Dimmack*, 1877, 7 C. D. 398.

(*k*) 44 & 45 Vict. c. 41.

named, and others would not bind them though named, yet as there was a middle class in which the assigns were bound if named, and not otherwise, it was prudent to provide for the possibility of a covenant being held to belong to this class (*l*). The provisions of the Conveyancing Act, 1881, annex to the reversion in the case of leases made after 31st December, 1881, the benefit of the lessee's covenants having reference to the subject-matter of the lease (*m*), and the obligation of the lessor's covenants with reference to the same subject-matter (*n*); and under sect. 58 of the same Act covenants relating to land of inheritance or to land not of inheritance are to be deemed to be made respectively with the covenantee, his heirs, and assigns, or with the covenantee, his executors, administrators, and assigns. But these provisions do not touch the case of the burden of the lessee's covenants, and it is still necessary for all covenants by the lessee relating to land, where the burden is intended to run with the land, to be made by the covenantor for himself and his assigns (*o*).

Difficulty of
performance.

Where there is a positive contract to do a thing not in itself unlawful, difficulty or even impossibility of performance is no excuse for a breach (*p*). But the rule applies only where the event which causes the impossibility could have been foreseen, or where the impossibility arises from the act or default of the promisor. Hence a covenant by the lessee for himself and his assigns not to build on the demised land will be discharged upon a compulsory assignment to a railway company (*q*). And a covenant is not binding on the lessee where the lessor is himself the cause of making it impossible for the lessee to observe it (*r*).

Covenants
void for
illegality.

Where a lease has been entered into for an illegal purpose, the covenants contained in it are void (*s*); and so is a covenant for indemnity given by the assignee of premises which have been used and are intended to be used

(*l*) 4 Jarm. Conv. by Sweet, 428. See *infra*, p. 405.

(*m*) 44 & 45 Vict. c. 41, s. 10; *infra*, p. 416.

(*n*) Sect. 11.

(*o*) See Wolstenholme, B. & C.'s Conveyancing Acts, 8th ed. p. 117.

(*p*) *Taylor v. Caldwell*, 1863, 3 B. & S. 826.

(*q*) *Baily v. De Crespigny*, 1869, L. R. 4 Q. B. 180; *infra*, p. 415.

(*r*) *Cornwall v. Dawson*, 1871, 24 L. T. 664.

(*s*) *Gas Light and Coke Co. v. Turner*, 1840, 6 Bing. N. C. 324.

for an immoral purpose (*t*). And a covenant in a lease may be void as being in restraint of trade (*u*).

The ordinary remedy on a covenant is by action to recover damages for breach of the covenant (*v*). Sometimes a specific sum is agreed to be paid by way of penalty, and the covenantee then has his election whether to bring an action for the penalty, or to proceed upon the covenant (*v*), though in either case only the actual damage sustained is recoverable (*y*). But the parties may agree upon a sum to be paid by way of liquidated damages, and if the sum is really liquidated damages they are bound by their agreement, and the sum named can be recovered. But the use of the terms "penalty" or "liquidated damages" is not conclusive (*z*), and whether the sum mentioned in an agreement to be paid for a breach of covenant is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the Judge upon a consideration of the whole instrument (*a*). Acquiescence by the lessor in a breach of covenant may bar his remedy, but he must have full knowledge of the breach (*b*).

Damages or penalty.

OPTION OF PURCHASE.

Leases sometimes contain a provision giving the lessee an option of purchase (*c*). For the provision to be valid it seems that a period must be fixed for the exercise of the option which does not transgress the rule against

Option of purchase.

(*t*) *Smith v. White*, 1866, 1 Eq. 626.

(*u*) *Hinde v. Gray*, 1840, 1 M. & Gr. 195.

(*v*) As to whether an action can be brought before actual breach, see *Johnstone v. Milling*, 1886, 16 Q. B. D. 460.

(*x*) *Lowe v. Peers*, 1768, 4 Burr. p. 2228.

(*y*) As to the effect of a judgment for the penalty, see 8 & 9 Will. 3, c. 11, s. 8; R. S. C. 1883, Ord. 13, r. 14.

(*z*) *Law v. Local Board of Redditch*, 1892, 1 Q. B. 127; see p. 132.

(*a*) *Sainter v. Ferguson*, 1849, 7 C. B. 727, per Wilde, C.J. The cases on the subject are reviewed in the judgment of Jessel, M.R., in *Wallis v. Smith*, 1882, 21 C. D. 243. See *Elphinstone v. Monkland Iron, &c., Coal Co.*, 1886, 11 A. C. 332; *Barton v. Capewell Patents Co.*, 1893, 68 L. T. 857. For a case where an additional rent for selling hay or straw off the premises was construed as a penalty, see *Willson v. Love*, 1896, 1 Q. B. 626; but a sum payable by the tenant of a public-house on conviction of an offence against the Licensing Acts has been treated as liquidated damages: *Ward v. Monaghan*, 1895, 11 T. L. R. 529.

(*b*) See *Ashcombe v. Mitchell*, 1895, 12 T. L. R. 17.

(*c*) Trustees and personal representatives cannot give such an option, *supra*, pp. 59, 60. As to tenant for life, *supra*, p. 47.

perpetuities—*i.e.* the option must necessarily be exercised, if at all, within twenty-one years from the date of the lease, where no life is named, or otherwise within some life in being or twenty-one years after (*d*).

Right to purchase money.

If the option is exercised by the lessee after the death of the lessor, the purchase-money will belong to the lessor's personal representatives and not to his heir or devisee, although the latter will take the rents until the option is exercised (*e*); unless by a will, made after the date of the contract by which the option is given, the testator specifically devises the property subject to the option without referring to the contract he has entered into (*f*). This is held to show an intention that the property should pass under the devise whatever form it might assume, but a specific devise made by a will dated before the contract has no such effect (*g*). Where, however, the will containing the specific devise was confirmed by a codicil made on the same day as the contract giving the option, the testator was held to have confirmed the will upon the footing of the option being exercisable, and the rule in *Lawes v. Bennett* was excluded (*h*). The inconvenience likely to result from the operation of the doctrine indicates the advisability of restricting the exercise of the option to a short period.

Conditions for exercise of option.

All conditions precedent imposed on the exercise of the option must be strictly fulfilled by the lessee before the contract of purchase can arise (*i*). Thus if it is provided that if the lessee should desire to purchase the fee simple, and should give three months' notice of such desire, and at the expiration of such notice should pay the purchase-money, the lessor will convey the property to the lessee,

(*d*) *London and South Western Ry. Co. v. Gomm*, 1882, 20 C. D. 562, 582; overruling *Birmingham Canal Co. v. Cartwright*, 1879, 11 C. D. 421. See articles in 42 Sol. Journ. pp. 628, 650.

(*e*) *Lawes v. Bennett*, 1785, 1 Cox, 167, 171; *Townley v. Bedwell*, 1808, 14 Ves. 591; *Collingwood v. Row*, 1857, 26 L. J. Ch. 649. The rule equally applies whether the grantor dies testate or intestate, and although the option is exercisable only after his death: *Re Isaacs*, 1894, 3 Ch. 506.

(*f*) *Weeding v. Weeding*, 1861, 1 J. & H. 424; *Drant v. Vause*, 1842, 1 Y. & C. C. C. 580; *Emuss v. Smith*, 1848, 2 De G. & S. 722.

(*g*) *Weeding v. Weeding*, *supra*.

(*h*) *Re Pyle*, 1895, 1 Ch. 724.

(*i*) *Weston v. Collins*, 1865, 34 L. J. Ch. 353. Where the right is given to the lessee and his assigns, it is not exercisable by an equitable assignee: *Friary, Holroyd & Co. v. Singleton*, 1899, 1 Ch. 86; unless the lessor has waived strict compliance with the terms of the option: *S. C.* on appeal, 1899, 2 Ch. 261. See *Re Adams*, 1884, 27 C. D. 394.

the lessee must pay the purchase-money on the day on which the three months' notice expires, or he will lose his right to require a conveyance (*k*).

The notice of intention to exercise the option must be in writing (*l*), and must be given to all the lessors (*ll*). Where the lease provides that if the lessee should be desirous at any time before a given date of purchasing the fee, and of such desire should give six calendar months' previous notice in writing, the notice must be given so that the six months shall expire not later than the specified date (*m*).

Notice to exercise option.

In a case where the lessor had a right of purchasing the lease it was held in Ireland that the purchase by the assignee of the reversion of the leasehold interest in a part only of the land included in the lease deprived him of his option to purchase the residue (*n*). But having regard to sect. 12 of the Conveyancing Act, 1881 (*o*), the decision might not now be followed.

Partial exercise.

Unless so expressed, it is not a condition precedent to the exercise of the option that the lessee shall have performed the stipulations in the lease. Hence in a building agreement with an option of purchase, where the lessee declared his option, and the lessor subsequently gave notice to determine the agreement for non-performance of the building stipulations, it was held that the lessee's option was well exercised (*p*). So the option is not forfeited by a breach of the covenant to insure (*q*). If the lessor is bound to insure, and the demised premises have been burnt before the declaration of the option of purchase, the lessee is not entitled, upon the principle of *Lawes v. Bennett* (*r*), to claim the insurance money (*s*). The principle of that case is not to be extended (*s*).

Effect on option of breach of covenant.

(*k*) *Ranelagh v. Melton*, 1864, 2 Dr. & Sm. 278; *Brooke v. Garrard*, 1857, 3 K. & J. 608; aff. 2 De G. & J. 62. See *Alderson v. White*, 1858, 2 De G. & J. 97; and cf. *Mills v. Haywood*, 1877, 6 C. D. 196.

(*l*) *Birmingham Canal Co. v. Cartwright*, 1879, 11 C. D. 421. See *Dawson v. Dawson*, 1837, 8 Sim. 346, and (as to an option to require a further lease at the end of the term) *Beatson v. Nicholas*, 1842, 6 Jur. 620. The notice may be served on the infant heir of the lessor: *Woods v. Hyde*, 1862, 31 L. J. Ch. 295. (*ll*) *Sutcliffe v. Wardle*, 1890, 63 L. T. 329.

(*m*) *Riddell v. Durnford*, 1893, 37 Sol. Journ. 267.

(*n*) *Sparrow v. Cooper*, 1833, Hayes & J. 404.

(*o*) 44 & 45 Vict. c. 41. (*p*) *Raffety v. Schofield*, 1897, 1 Ch. 937.

(*q*) *Green v. Low*, 1856, 22 Beav. 625. (*r*) *Supra*, p. 160.

(*s*) *Edwards v. West*, 1878, 7 C. D. 858. Cf. *Reynard v. Arnold*, 1875, 10 Ch. 386.

OPTION TO DETERMINE LEASE.

Option to
determine
lease.

A provision is frequently inserted in leases allowing of the lease being terminated at a specified time or times by notice given by one party to the other, usually by the lessee to the lessor. In the absence of provision on the subject such an option is exercisable by the lessee only (*u*). Hence, if it is to be exercisable by the lessor also, this should be expressly stated (*x*).

COVENANT FOR RENEWAL.

Construction
of covenant
for renewal.

Leases sometimes contain a covenant on the part of the lessor for renewal of the lease at the expiration of the term, or at some period within the term (*y*). Usually it is expressed that the new lease shall be subject to the same covenants as the old lease, but such a stipulation by itself does not entitle the lessee to have the covenant for renewal again inserted so as to give him a right to a perpetual renewal (*z*). The Courts, it has been frequently said, lean against construing a covenant to be for a perpetual renewal unless such an intention is clearly expressed (*a*). And the intention is to be gathered only from the language of the deed; the construction is not affected by the acts of the parties, as where a renewal has already been several times granted (*b*). The covenant, however, will be construed as perpetual if such an intention is apparent, as where the lease is expressly made renewable for ever (*c*), or where the lessor covenants to renew at any time when requested by the lessee (*d*), or where the covenant is for renewal with the

(*u*) *Infra*, p. 450.

(*x*) For the effect of words purporting to make the exercise of the option dependent on the payment of rent and performance of covenants, see *supra*, p. 155, and *Dav. Conv.*, Vol. V., Part I., p. 341, note (*c*).

(*y*) See *Bogg v. Midland Ry. Co.*, 1867, 4 Eq. 310. As to a right of renewal of a sub-lease, see *infra*, p. 390.

(*z*) *Tritton v. Footc.*, 1789, 2 Bro. C. C. 636; *Hyde v. Skiuner*, 1723, 2 P. Wms. 196.

(*a*) *Baynham v. Guy's Hospital*, 1796, 3 Ves. p. 298; *Moore v. Foley*, 1801, 6 Ves. p. 237; *Iggulden v. May*, 1804, 9 Ves. p. 330; *Brown v. Tighe*, 1834, 2 Cl. & F. p. 416; *Swinburne v. Milburn*, 1884, 9 App. Cas. p. 850. Cf. *Smyth v. Nangle*, 1840, 7 Cl. & F. 405.

(*b*) *Baynham v. Guy's Hospital*, *supra*; *Eaton v. Lyon*, 1798, 3 Ves. p. 694; *Iggulden v. May*, *supra*.

(*c*) *City of London v. Mitford*, 1807, 14 Ves. 41; *Nicholson v. Smith*, 1882, 22 C. D. 640.

(*d*) *Copper Mining Co. v. Beach*, 1823, 13 Beav. 478. See *Furnival v. Crew*, 1744, 3 Atk. 83; and cf. *Brown v. Tighe*, *supra*.

same covenants "including the present covenant" (*e*). If the lessee dies within the term, the right of renewal passes to his executors (*f*).

Before the end of the term the lessee must give formal notice of his intention to renew (*g*). Default in this respect may cause him to forfeit his rights under the covenant (*h*). If the new lease is to be granted in case the covenants in the lessee's part have been duly performed (*i*), or upon his "performing and observing the covenants" (*k*), such performance is a condition precedent to renewal, and if, at the time for renewal, there is a breach of covenant, though not serious (*l*), the right to renewal is lost. But if the covenant is for renewal upon payment of a specified sum of money, it is not necessary that such sum should be paid before the end of the term. It is enough if it is paid when the new lease is ready for execution (*m*).

Conditions of renewal.

PROVISO FOR RE-ENTRY.

A proviso for re-entry on non-payment of rent or non-performance or non-observance of any of the covenants by the lessee contained in the lease is generally inserted; but it has been held that the insertion of a proviso for re-entry on non-performance or non-observance of covenants cannot be insisted on where a lease is made in pursuance of an agreement which is either silent as to the provisions to be contained in the lease, or provides that it shall contain the "usual provisions" (*n*). And though a proviso for re-entry on the

Provisoes for re-entry.

(*e*) *Hare v. Burges*, 1857, 4 K. & J. 45.

(*f*) *Hyde v. Skinner*, 1723, 2 P. Wms. 196.

(*g*) *Nicholson v. Smith*, 1882, 22 C. D. 640; *Harries v. Bryant*, 1827, 4 Russ. 89; *Wight v. E. of Hopetoun*, 1864, 4 Macq. 729; see *Rubery v. Jervoise*, 1786, 1 T. R. 229.

(*h*) *Bayly v. Corp. of Leominster*, 1792, 1 Ves. 476; *Eaton v. Lyon*, 1798, 3 Ves. 690; *City of London v. Mitford*, *supra*; though relief may in some cases be obtained in equity against failure to observe the requirements of renewal: *E. of Ross v. Worsop*, 1740, 1 Bro. P. C. 281; *Statham v. Trustees of Liverpool Docks*, 1830, 3 Y. & J. 565; as where it would, under the circumstances, be inequitable for the lessor to insist on strict compliance: *Hunter v. E. of Hopetoun*, 1865, 13 L. T. 130.

(*i*) *Finch v. Underwood*, 1876, 2 C. D. 310; *Job v. Banister*, 1856, 2 K. & J. 374.

(*k*) *Bastin v. Bidwell*, 1881, 18 C. D. 238. Cf. *Thompson v. Guyon*, 1831, 5 Sim. 65.

(*l*) *Finch v. Underwood*, *supra*.

(*m*) *Nicholson v. Smith*, *supra*.

(*n*) *Hodgkinson v. Crewe*, 1875, 10 Ch. 622. See *supra*, p. 154.

bankruptcy of the lessee (*o*), or on his contracting a debt upon which judgment should be signed and execution issue (*p*), is lawful, yet it is not a "usual provision" (*q*), and it makes no difference that the subject-matter of the lease is a public-house (*r*). The law on the subject has not been altered by the increased facilities for obtaining relief against forfeiture given by sect. 14 of the Conveyancing Act, 1881 (*s*).

Perhaps, however, a power of re-entry in case any other business than that of a licensed victualler is carried on upon the premises is usual in a lease of a public-house (*t*).

Right of
re-entry
although no
reversion.

The right of re-entry does not depend on the existence of a reversion. Hence it may exist in a lessee who has assigned his whole interest, subject to a right of re-entry on breach of a condition (*u*). A right of entry for a condition broken is not assignable under 8 & 9 Vict. c. 106, s. 6, that enactment referring to a right of entry in an owner kept out of possession (*x*).

Proviso for
re-entry, how
framed.

It is not essential that leases containing provisos or conditions for re-entry should be made by deed (*y*); or that any special form of words should be used in the proviso. It is sufficient if it appear that the words used were intended to have the effect of creating a condition, as, "it is stipulated and conditioned" (*z*). But a power of re-entry will not be implied from mere words of agreement (*a*). Formerly the right of entry could not be reserved to a stranger to the legal estate in the premises (*b*), but the

(*o*) *Roe v. Galliers*, 1787, 2 T. R. 133. See *Church v. Browne*, 1808, 15 Ves. p. 268.

(*p*) See *Davis v. Eyton*, 1830, 7 Bing. 154. As to the construction of provisos for re-entry, see *Doe v. Pritchard*, 1833, 5 B. & Ad. 765; *Doe v. Davies*, 1834, 6 C. & P. 614; 1 Cr. M. & R. 405; *Doe v. Rees*, 1838, 4 Bing. N. C. 384; *Hunt v. Bishop*, 1853, 8 Ex. 675.

(*q*) *Hodgkinson v. Crowe*, 1875, 10 Ch. 622; *Hyde v. Warden*, 1877, 3 Ex. D. 73.

(*r*) *Re Lander and Bagley's Contract*, 1892, 3 Ch. 41; *Hampshire v. Wickens*, 1878, 7 C. D. 555. Reliance cannot now be placed on *Haines v. Burnett*, 1859, 27 Beav. 500, which was to the contrary.

(*s*) *Re Anderton and Milner's Contract*, 1890, 45 C. D. 476.

(*t*) *Bennett v. Womack*, 1828, 7 B. & C. 627.

(*u*) *Doe v. Bateman*, 1818, 2 B. & A. 168.

(*x*) *Hunt v. Bishop*, 1853, 8 Ex. 675; *Hunt v. Remnant*, 1854, 9 Ex. 635. (*y*) See *Hayne v. Cummings*, 1864, 16 C. B. N. S. 421.

(*z*) *Doe v. Watt*, 1828, 8 B. & C. p. 315.

(*a*) *Shaw v. Coffin*, 14 C. B. N. S. 372. See *Crawley v. Price*, 1875, L. R. 10 Q. B. 302.

(*b*) Litt. s. 347; *Doe v. Lawrence*, 1811, 4 Taunt. 23; *Saunders v.*

strictness of the rule has been modified by recent statutes. Under 8 & 9 Vict. c. 106 (*bb*), s. 5, the benefit of a condition or covenant in an indenture respecting any tenements or hereditaments may be taken by a person not named a party to the indenture; and under sect. 10 of the Conveyancing Act, 1881 (*c*), every condition of re-entry contained in a lease is to be annexed and incident to, and to go with, the reversionary estate in the land or in any part thereof immediately expectant on the term granted by the lease, and is to be capable of being enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the land leased. Apparently the phrase "person entitled to the income" includes the beneficial owner.

Who may
take benefit
of proviso.

The words which were formerly inserted in provisoes for re-entry, authorizing the lessor to effect a forcible entry and eject the lessee (*d*), are void as giving a licence to commit a crime (*e*).

Forcible
re-entry.

It is sometimes said that provisoes for re-entry are to be construed strictly (*f*), but before any such rule is applied the meaning of the proviso must be ascertained by a proper consideration of the language used. Conditions of this nature are entitled neither to favour nor disfavour, whether they are to create a forfeiture or continue an estate; but a fair construction is to be put upon them according to the apparent intent of the contracting parties (*g*). It must be clear that the condition was meant to include the covenant for breach whereof the right of re-entry is claimed (*h*), and that there has been a breach of covenant (*i*); but the question of breach or no breach must be determined by reference to the rules which prevail in construing ordinary contracts between party and party (*k*).

Construction
of provisoes
for re-entry.

Merryweather, 1865, 3 H. & C. 902; *Doe v. Goldsmith*, 1832, 2 Cr. & J. 674. See *Doe v. Adams*, 1832, *ib.* 232.

(*bb*) The Real Property Act, 1845. (*c*) 44 & 45 Vict. c. 41.

(*d*) See, for instance, the proviso in *Kavanagh v. Gudge*, 1844, 7 M. & Gr. 316. (*e*) *Edwick v. Hawkes*, 1881, 18 C. D. 199, 208. *Infra*, p. 518.

(*f*) See *Doe v. Godwin*, 1815, 4 M. & S. p. 269; *Doe v. Marchetti*, 1831, 1 B. & Ad. 715, 720.

(*g*) Per Lord Ellenborough, C.J., in *Goodtitle v. Saville*, 1812, 16 East, p. 95; *Doe v. Elsam*, 1828, Moo. & M. 189; *Doe v. Gludwin*, 1845, 6 Q. B. p. 961. (*h*) *Croft v. Lumley*, 1858, 6 H. L. C. p. 693.

(*i*) *West v. Dobbs*, 1870, L. R. 5 Q. B. 460. See per Cotton, L.J., in *Corp. of Bristol v. Westcott*, 1879, 12 C. D. p. 467.

(*k*) *Croft v. Lumley*, *supra*.

In cases of doubt, however, the principle of the rule that the words of a covenant must be taken against the covenantor applies more strongly to a proviso for re-entry, which contains a condition that destroys or defeats the estate (*l*). Where a proviso is insensible, it seems that the Courts will not find out a meaning for it (*m*).

Re-entry on
breach of
negative
covenant.

It was suggested in *West v. Dobb* (*n*) that a proviso of re-entry could not apply to a breach of a negative covenant, and if the proviso simply provides for re-entry on *non-performance* of the covenants in the lease, it seems that this is correct (*o*). But a proviso for re-entry if the lessee shall not *perform and keep* the covenants is wide enough to cover breaches of negative covenants (*p*), and this is the case generally where the proviso is aimed at non-observance as well as non-performance (*q*).

Construction
of particular
provisoes (*r*).

PROVISO *for re-entry for breach of covenants "hereinafter contained."* The lessor cannot re-enter for breach of a covenant placed *before* the proviso in the lease, although there are no covenants by the lessee after the proviso (*s*).

PROVISO *for re-entry if the lessee shall "do or cause to be done any act, matter or thing whatsoever contrary to or in breach of any one or more of the covenants."* Does not apply to a breach of a covenant to repair, the omission to repair not being *an act done* within the meaning of the proviso (*t*).

PROVISO *for re-entry if the lessee "shall, by the space of thirty days next after notice for that purpose, make default in the performance of any or either of the clauses or agreements herein contained."* Does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission (*u*).

PROVISO *for re-entry "if the lessee shall make default in the*

(*l*) Per Lord Tenterden, C.J., in *Doe v. Stevens*, 1832, 3 B. & Ad. at p. 303.

(*m*) *Doe v. Carew*, 1841, 2 Q. B. 317. (*n*) 1870, L. R. 5 Q. B. 460.

(*o*) *Hyde v. Warden*, 1877, 3 Ex. D. p. 82, per Brett, C.J.; *Evans v. Davis*, 1878, 10 C. D. p. 761, per Fry, J.

(*p*) *Evans v. Davis*, *supra*. (*q*) *Timms v. Baker*, 1883, 49 L. T. 106.

(*r*) As to proviso for re-entry on assignment, see *infra*, Ch. V.

(*s*) *Doe v. Godwin*, 1815, 4 M. & S. 265.

(*t*) *Doe v. Stevens*, 1832, 3 B. & Ad. 299.

(*u*) *Doe v. Marchetti*, 1831, 1 B. & Ad. 715.

performance of all or any of the covenants which on his part are or ought to be observed, performed or kept." Applies to and forbids the breach of a negative as well as a positive covenant (x).

PROVISO for re-entry if the lessee shall "*be duly found and declared a bankrupt.*" Does not apply where the tenant is found and declared a bankrupt without a proper petitioning creditor's debt (y).

PROVISO for re-entry "*if the lessee, his executors, administrators or assigns, shall become bankrupt.*" Refers only to the bankruptcy of the person who for the time being is possessed of the term, and there is no forfeiture on the bankruptcy of the original lessee after assignment by him (z).

PROVISO for re-entry if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, &c. The right of re-entry accrues on the bankruptcy of the survivor of certain executors to whom the tenant, dying during the term, has bequeathed the premises on trust (a).

PROVISO for re-entry if the lessee shall "*happen to become insolvent and unable in circumstances to go on with the management of the farm.*" It was doubtful whether the attainder of the tenant was a forfeiture of the lease (b).

PROVISO for re-entry "*in case the term of years hereby granted shall be extended or taken in execution.*" Seizure by the sheriff under a writ of extent against the lessee at the suit of the Crown is a taking in execution within this proviso (c).

PROVISO in a demise to a company for re-entry if the company "*shall be wound up voluntarily or by compulsion or otherwise under the provisions of any Act of Parliament.*" The right of re-entry accrues on the making of the winding-up order, and is not deferred

(x) *Croft v. Lumley*, 1858, 6 H. L. C. 672. And as to breach of negative covenants, see *supra*, p. 166.

(y) *Doe v. Ingleby*, 1846, 15 M. & W. 463.

(z) *Smith v. Gronow*, 1891, 2 Q. B. 394. Provisoes of this nature run with the land: *Williams v. Earle*, 1868, L. R. 3 Q. B. p. 749; *Horsey Estate, Lim. v. Steiger*, 1899, 2 Q. B. 79.

(a) *Doe v. David*, 1834, 1 Cr. M. & R. 405; 6 C. & P. 614.

(b) *Doe v. Pritchard*, 1833, 5 B. & Ad. 765.

(c) *Rex v. Topping*, 1825, M'Clel. & Y. 544.

till the end of the winding-up (*d*) ; and it accrues upon a voluntary liquidation, although the liquidation is effected merely for the purpose of reconstruction (*e*).

PROVISO for re-entry "*if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after the same shall have become due, being demanded.*" Before the landlord can enforce his right of re-entry, the rent must have been in arrear for twenty-one days, and demand must be made after the end of that period. The demand need not, however, be accompanied with the formalities required for a common law demand of rent (*f*).

PROVISO for re-entry "*in case of breach of any of the agreements herein contained*" (in a written agreement whereby premises are let for a term, "*at and under the rent of 80l.*"). The lessor may re-enter for non-payment of rent, although there is no express agreement to pay rent (*g*).

PROVISO for re-entry upon breach of any of the covenants, enumerating all the covenants except a covenant not to carry off hay, &c., under a penalty of 5*l.* per ton. The meaning is, that if the hay be removed without payment of that sum, the right of re-entry shall accrue (*h*).

PROVISO for re-entry *if the tenant does not execute certain repairs to the satisfaction of the surveyor of the lessor.* It is sufficient if those who try the cause think that the surveyor ought to have been satisfied with the repairs which are done, and, although he is not in fact satisfied, no forfeiture will be incurred (*i*).

PROVISO for re-entry "*in case no sufficient distress can be found upon the premises.*" Search for distrainable goods must be made in every part of the premises (*k*).

(*d*) *General Share and Trust Co. v. Wetley Brick Co.*, 1882, 20 C. D. 260.

(*e*) *Horsey Estate, Lim. v. Steiger*, 1898, 2 Q. B. 259 ; 1899, 2 Q. B. 79.

(*f*) *Phillips v. Bridge*, 1873, L. R. 9 C. P. 48, 53. So where the expression is "legally demanded," *Thorp v. Hunt*, 1886, W. N. p. 96. Cf. *Manser v. Dic*, 1857, 8 D. M. & G. 703. As to the formalities of the common law demand, see *infra*, p. 466 ; 1 Wms. Saund. ed. 1871, p. 434 ; *Doe v. Bowditch*, 1846, 8 Q. B. 973.

(*g*) *Doe v. Kneller*, 1829, 4 C. & P. 3.

(*h*) *Doe v. Jepson*, 1832, 3 B. & Ad. 402, 403.

(*i*) *Doe v. Jones*, 1848, 2 C. & K. 743.

(*k*) *Rees v. King*, 1800, Forrest, 19.

PROVISO for re-entry "*if and whenever*" any one quarter's rent shall be in arrear for twenty-one days, and no sufficient distress can be levied. When three quarters' rent was in arrear, the landlord distrained, and after sale of the distress there remained due more than one quarter's rent. Held, that the landlord was entitled to recover possession, the two conditions existing when the action was brought (*l*).

PROVISO for re-entry "*if the lessee shall commit waste to the value of 10s.*" The waste contemplated in the proviso is waste producing an injury to the reversion (*m*).

PROVISO for re-entry in default of making it appear, by a good and sufficient certificate, that a certain person in a foreign country is living. The fact cannot be properly certified by hearsay, or presumptive evidence (*n*).

Sometimes there is inserted in a lease a proviso enabling a lessor to resume possession of any portion, or certain specified portions, of the demised land on giving notice to the lessee.

Power to resume possession of part of demised premises.

PROVISO empowering the lessor to resume any portion of the demised land which may be required for the purpose of "*building, planting, accommodation or otherwise.*"

Construction of provisos.

The words *or otherwise* must be held to refer to some purposes of the same character as those before specified, and the proviso will not enable the lessor to resume a portion of the land for the purpose of conveying it to a railway company (*o*).

PROVISO giving the lessor's son power to take the demised house for himself when he comes of age. The son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable (*p*).

COVENANT that if lessor shall be desirous, during the term, to take all or any part of the land for building

(*l*) *Shepherd v. Berger*, 1891, 1 Q. B. 597.

(*m*) *Doe v. Bond*, 1826, 5 B. & C. 855.

(*n*) *Randle v. Lory*, 1837, 6 A. & E. 218.

(*o*) *Johnson v. Edgware, Highgate and London Ry. Co.*, 1866, 35 Beav.

(*p*) *Doe v. Smith*, 1788, 2 T. R. 436.

thereon it shall be lawful for her to enter upon all or any part to make such buildings as she shall think proper, and to do all necessary acts without interruption by the lessee, provided the lessor give six months' notice of such intention. This is not merely a covenant that the lessor may come upon the land in order to build upon it, but she may take the whole of the land back for the purpose of building (q).

STIPULATION *in an agreement to let (in which there was no clause of re-entry) that in case the landlord should want any part of the demised land to build, or otherwise, the lessee will give up that part on a proportionate abatement being made in the rent, the fences being paid for and six months' notice being given.* This is a covenant and not a condition operating in defeasance of the estate (r).

(4) STAMPS ON LEASES.

An instrument in writing (s) or under seal which operates as a lease must bear a stamp to be calculated according to the scale subsequently set out (t). But the duty is only chargeable when there is an absolute demise (or agreement for demise) of the premises (u). A mere acknowledgment of an antecedent tenancy does not require a lease stamp (x).

LEASE (y)—

£ s. d.

(1) For any definite term not exceeding a year :

Of any dwelling-house or part of a dwelling-house at a rent not exceeding the rate of 10l. per annum 0 0 1

(q) *Doe v. Abel*, 1814, 2 M. & S. 541, 549. See *Doe v. Kennard*, 1848, 12 Q. B. 244.

(r) *Doe v. Phillips*, 1824, 2 Bing. 13.

(s) Although the lease might have been made by parol: *Prosser v. Phillips*, Bull. N. P. 269.

(t) As to when an adhesive stamp may be used, see Stamp Act, 1891, s. 78; and see sects. 7 and 8.

(u) See *Conservators of River Thames v. Comm. of Inland Revenue*, 1836, 18 Q. B. D. 279. A written proposal as to a particular point, pending negotiations for a lease, may be given in evidence without a stamp: *Bethell v. Blencowe*, 1841, 3 M. & Gr. 119.

(x) *Eagleton v. Gutteridge*, 1843, 11 M. & W. 465. See *Hill v. Ramm*, 1843, 5 M. & Gr. 789; and as to admission of a tenancy on sufferance, see *Barry v. Goodman*, 1837, 2 M. & W. 768.

(y) The term as used here does not apply to a lease of chattels, and an agreement for the use of telephone wires reserving an annual payment

Stamp
Act, 1891,
Schedule.
Amount of
duty.

(2) For any definite term less than a year— £ s. d.

(a) Of any furnished dwelling-house or apartments
where the rent for such term exceeds 25*l.* (z) . 0 2 6

(b) Of any lands or tenements, except or otherwise
than as aforesaid { The same duty
as a lease for
a year at the
rent reserved
for the defi-
nite term.

(3) For any other definite term or for any indefinite term—

Of any lands or tenements :

Where the consideration, or any part of the con-
sideration, moving either to the lessor or to any
other person (a), consists of any money, stock
or security :

In respect of such consideration { The same duty
as a convey-
ance on a sale
for the same
considera-
tion (b).

Where the consideration or any part of the
consideration is any rent :

is chargeable as a bond, covenant or instrument constituting a principal
security : *Jones v. Comm. of Inland Revenue*, 1895, 1 Q. B. pp. 492,
493 ; *National Telephone Co. v. Comm. of Inland Revenue*, 1899, 1 Q. B.
250.

(z) The duty under (1), and also that on a lease of any furnished
dwelling-house or apartments for any definite term less than a year, may
be denoted by an adhesive stamp, sect. 78 (1).

(u) Hence where a builder sells a house, and the lease is taken direct
from the ground landlord to the purchaser, the lease must show the
purchase-money paid to the builder. See *Att-Gen. v. Brown*, 1849,
3 Ex. 662. The statute 55 Geo. 3, c. 184, s. 8, requiring the considera-
tion to be set out, and imposing an *ad valorem* duty on the consideration,
applied only to the case of a consideration passing between the lessor
and the lessee : *Boone v. Mitchell*, 1822, 1 B. & C. 18, 20.

(b) *I.e.*—Where the amount or value of the consideration £ s. d.

for the sale does not exceed 5 <i>l.</i>	0	0	6
Exceeds 5 <i>l.</i> and does not exceed 10 <i>l.</i>	0	1	0
" 10 <i>l.</i> " " 15 <i>l.</i>	0	1	6
" 15 <i>l.</i> " " 20 <i>l.</i>	0	2	0
" 20 <i>l.</i> " " 25 <i>l.</i>	0	2	6
" 25 <i>l.</i> " " 50 <i>l.</i>	0	5	0
" 50 <i>l.</i> " " 75 <i>l.</i>	0	7	6
" 75 <i>l.</i> " " 100 <i>l.</i>	0	10	0
" 100 <i>l.</i> " " 125 <i>l.</i>	0	12	6
" 125 <i>l.</i> " " 150 <i>l.</i>	0	15	0
" 150 <i>l.</i> " " 175 <i>l.</i>	0	17	6
" 175 <i>l.</i> " " 200 <i>l.</i>	1	0	0
" 200 <i>l.</i> " " 225 <i>l.</i>	1	2	6
" 225 <i>l.</i> " " 250 <i>l.</i>	1	5	0
" 250 <i>l.</i> " " 275 <i>l.</i>	1	7	6
" 275 <i>l.</i> " " 300 <i>l.</i>	1	10	0
" 300 <i>l.</i>			

For every 50*l.*, and also for any fractional part
of 50*l.*, of such amount or value 0 5 0

In respect of such consideration :

If the rent (c), whether reserved as a yearly rent or otherwise, is at a rate or average rate (d) :

	If the term does not exceed 35 years, or is indefinite.			If the term exceeds 35 years, but does not exceed 100 years.			If the term exceeds 100 years.		
	£	s.	d.	£	s.	d.	£	s.	d.
Not exceeding 5 <i>l.</i> per annum	0	0	6	0	3	0	0	6	0
Exceeding—									
5 <i>l.</i> and not exceeding 10 <i>l.</i>	0	1	0	0	6	0	0	12	0
10 <i>l.</i> " " 15 <i>l.</i>	0	1	6	0	9	0	0	18	0
15 <i>l.</i> " " 20 <i>l.</i>	0	2	0	0	12	0	1	4	0
20 <i>l.</i> " " 25 <i>l.</i>	0	2	6	0	15	0	1	10	0
25 <i>l.</i> " " 50 <i>l.</i>	0	5	0	1	10	0	3	0	0
50 <i>l.</i> " " 75 <i>l.</i>	0	7	6	2	5	0	4	10	0
75 <i>l.</i> " " 100 <i>l.</i>	0	10	0	3	0	0	6	0	0
100 <i>l.</i>									
For every full sum of 50 <i>l.</i> , and also for any fractional part of 50 <i>l.</i> thereof . . .	0	5	0	1	10	0	3	0	0

(4) Of any other kind whatsoever not hereinbefore described 0 10 0

Lease in
pursuance of
stamped
agreement,
sect. 75 (2).

A lease made subsequently to, and in conformity with, an agreement for a lease of any lands or tenements for any term not exceeding thirty-five years, or for any indefinite term, duly stamped, requires a stamp of 6*d.* only (e).

Special
provisions.

For special provisions as to the amount of duty in the case of produce and penal rents, and on certain ecclesiastical leases, see sects. 76, 77 ; as to exemption of Crown leases in the Forest of Dean, 24 & 25 Vict. c. 40, s. 22 ; of leases by the Commissioners of Works, Stamp Act, 1891, Schedule, General Exemptions ; by the Commissioners of Woods and Forests, 10 Geo. 4, c. 50, s. 77 ; Crown Lands Acts, 1851 (14 & 15 Vict. c. 42), s. 2 ; as to foreshores, Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 10 ; as to licences for minerals in the Duchy of Cornwall, 7 & 8 Vict. c. 65, s. 43.

Mining leases.

The Stamp Act, 1891, makes no special provision for the duty to be paid on mining leases containing reservations of

(c) *I.e.* the ascertainable rent, whether the amount is stated or not : *Parry v. Deere*, 1836, 5 A. & E. 551. See *Wilson v. Smith*, 1844, 12 M. & W. 401.

(d) As to the stamp before 1871, see *Pearson v. Comm. of Inland Revenue*, 1868, L. R. 3 Ex. 242.

(e) *Supra*, p. 117.

footage or acreage rents (*f*), or royalties, varying with the amount of minerals won. Sums of money so reserved are in the nature of rent, not of purchase-money (*g*). In respect of the varying rent a stamp duty of 10s. is payable, and in addition *ad valorem* duty is payable on any minimum or dead rent that may be reserved (*h*).

All the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument; and every person who, with intent to defraud her Majesty—

Stamp Act,
1891 (*i*), s. 5.
Facts and
circumstances
affecting duty
to be set forth.

(1) Executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or

(2) Being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances;

shall incur a fine of ten pounds.

The misstatement of the consideration, though it subjects the parties to the lease, and the solicitor preparing it, to penalties, does not avoid the instrument (*k*). Nor is the penalty enforceable if the duty actually paid is that which would have been payable if all the facts and circumstances had been truly set forth in the instrument (*l*).

Effect of mis-
statement of
consideration.

Under sect. 4 an instrument relating to several distinct matters is to be charged separately with duty in respect of each of the matters. But no further stamp is necessary by reason of the lease containing a covenant to build, or any covenant relating to the matter of the lease (*ll*). If a lease

Instrument
relating to
distinct
matters.

(*f*) See MacSwinney on Mines, 2nd ed. pp. 234, 554.

(*g*) *Barrs v. Lee*, 1864, 33 L. J. Ch. 437.

(*h*) See Alpe's Stamp Duties, 6th ed. p. 151. (*i*) 54 & 55 Vict. c. 39.

(*k*) *Doe v. Hobson*, 1823, 3 D. & R. 186; *Robinson v. Macdonnell*, 1816, 5 M. & S. at p. 234; *Duck v. Braddyll*, 1824, 13 Price, p. 469; *Steer v. Cowley*, 1863, 14 C. B. N. S. p. 357: decided on similar provisions in 48 Geo. 3, c. 149.

(*l*) Alpe's Stamp Duties, 6th ed. p. 21. Previously to 1871 the amount of the duty was regulated by the consideration or rent expressed to be paid, and not by that which was actually paid: *Doe v. Lewis*, 1830, 10 B. & C. 673; *Duck v. Braddyll*, *supra*. Under the Stamp Act, 1870, and the present Act, it is the actual consideration which determines the stamp. See Schedule, tit. Conveyance; compare judgment in *Doe v. Lewis*, 10 B. & C. p. 675.

(*ll*) Sect. 77 (2).

contains a demise of two subject-matters and reserves two rents, but the letting is to the same person and is one transaction, one *ad valorem* stamp on the aggregate amount of both rents is sufficient (*m*). But if the power of re-entry and distress in respect of rent owing for a particular parcel is restricted to that parcel only, it appears that the Revenue authorities regard the instrument as separate leases, and claim that separate duties are payable (*n*). A lease of several pieces of land to different persons is liable to *ad valorem* duty on the separate rents (*o*), and if it bears only one stamp evidence is admissible to show to which name the stamp is to be allocated (*p*).

If a certain rent is reserved for a house and land, and by a separate reservation in the same lease another rent is made payable for furniture and fixtures, an *ad valorem* stamp on the rent of the house and land only is not sufficient (*q*). And where a lease contains a contract for the sale of fixtures, the instrument must be stamped in respect both of the lease and the contract (*r*). Consequently it cannot be given in evidence to prove the value of the fixtures unless it has a lease stamp, although it has an agreement stamp (*r*).

Lease with
option of
purchase.

A lease containing an agreement, giving the lessee the option of purchasing the premises demised for a specified sum, requires only a lease stamp (*s*) ; unless the agreement to purchase relates to other premises besides those which are the subject of the lease, in which case an agreement stamp also will be necessary (*t*).

Guarantee for
rent.

Where a stranger covenants in the lease for payment of rent, the instrument is sufficiently stamped as a lease only, the covenant being part of the consideration for granting the lease (*u*).

(*m*) *Boase v. Jackson*, 1822, 3 Br. & B. 185 ; *Blount v. Pearman*, 1834, 1 Bing. N. C. 408 ; *Parry v. Deere*, 1836, 5 A. & E. 551 ; *Reg. v. Hockworthy*, 1837, 7 A. & E. 492. (*n*) *Alpe's Stamp Duties*, 6th ed. p. 152.

(*o*) *Doe v. Day*, 1811, 13 East, 241. See *Cooper v. Flynn*, 1841, 3 Ir. L. R. 473. (*p*) *Doe v. Day*, *supra*.

(*q*) *Coster v. Cowling*, 1831, 7 Bing. 456.

(*r*) *Corder v. Drakeford*, 1811, 3 Taunt. 382. See *Clayton v. Burtenshaw*, 1826, 5 B. & C. 41 ; and *cf.* *Wick v. Hodgson*, 1827, 12 Moo. 213 ; *Horsfall v. Hey*, 1848, 2 Ex. 778.

(*s*) *Worthington v. Warrington*, 1848, 5 C. B. 635.

(*t*) See *Lovclock v. Franklyn*, 1846, 8 Q. B. 371.

(*u*) *Price v. Thomas*, 1831, 2 B. & Ad. 218. But it has been held otherwise where there was a guarantee for payment of penalties : *Wharton v. Walton*, 1845, 7 Q. B. 474.

A lease upon which *ad valorem* duty is payable must, unless the duty may be denoted by an adhesive stamp, be stamped within thirty days after it is first executed, or after it has been first received in the United Kingdom, in case it is first executed out of the United Kingdom, unless it has been submitted for adjudication. If it has been submitted for adjudication, it must be stamped within fourteen days after notice of the assessment (*x*). Time of stamping.

A lease the duty upon which may be denoted by an adhesive stamp must be stamped at the time of execution (*y*). Stamping after date.

After these periods a lease cannot in general be stamped without payment of a penalty, but the Commissioners may, if they think fit, at any time mitigate or remit any penalty payable on stamping (*z*). In the case, however, of leases the duty on which may be denoted by adhesive stamps, since a penalty is imposed for non-stamping on execution, the Commissioners usually decline to stamp them after execution without inflicting the penalty under sect. 15 (*a*). The date of the instrument is accepted as *primâ facie* evidence of the date of execution, but any alteration or erasure of the date must be explained by a statutory declaration (*b*).

The want of a proper stamp (*c*) does not invalidate the lease, but makes it inadmissible in evidence (*d*), except on payment of penalties (*e*), for any purpose whatever (*f*). A new trial will not be granted by reason of the ruling of a judge that the stamp on a document is sufficient, or that it does not require a stamp (*g*). Upon a sale of property subject to a yearly tenancy under an agreement in writing, the purchaser is entitled to have the agreement stamped at the vendor's expense (*h*). Insufficiency of stamp.

(*x*) Stamp Act, 1891, s. 15.

(*y*) Sect. 78.

(*z*) Sect. 15 (3) (*b*), as amended by sect. 15 of the Finance Act, 1895 (58 & 59 Vict. c. 16).

(*a*) Alpe's Stamp Duties, 6th ed. p. 45.

(*b*) *Ib.*, p. 46.

(*c*) See Stamp Act, 1891, s. 14 (4). The sufficiency of the stamp depends on the law at the time of execution without regard to nominal date : *Clarke v. Roche*, 1877, 3 Q. B. D. 170.

(*d*) See *Turner v. Power*, 1828, 7 B. & C. 625 ; and the judge is bound to reject it : *Bowker v. Williamson*, 1889, 5 T. L. R. 382.

(*e*) Stamp Act, 1891, s. 14 (1).

(*f*) *Cf. Matheson v. Ross*, 1849, 2 H. L. C. p. 300.

(*g*) R. S. C. 1883, Ord. 39, r. 8 ; *Blewitt v. Tritton*, 1892, 2 Q. B. 327. And similarly in the county court : *Mander v. Ridgway*, 1898, 1 Q. B. 501.

(*h*) *Coleman v. Coleman*, 1898, 79 L. T. 66.

(5) COUNTERPARTS AND DUPLICATES.

Counterpart. Leases are usually prepared in two parts, known respectively as the lease and counterpart. The lease is executed by the lessor alone, and is kept by the lessee (*i*). The counterpart is executed by the lessee alone, and is kept by the lessor. The production of a counterpart, properly stamped and executed by the lessee, is presumptive evidence of the execution of a lease (*k*), and the counterpart is primary evidence as against the lessee who executes it and persons claiming under him (*l*). A lessee who executes the counterpart of a lease cannot dispute its admissibility in evidence upon the ground of the original lease not being properly stamped (*m*).

When essential. Statutes by which powers of leasing are conferred generally require the execution of a counterpart by the lessee (*n*). And a similar requirement is often inserted in powers of leasing contained in settlements. Since in such a case the execution of a counterpart is a condition of the validity of the lease, and the lessee may not be able to show that this condition has been fulfilled, he should obtain a memorandum of the execution of the counterpart and its delivery to be indorsed on the lease and signed by the lessor (*o*). Statutory powers of leasing usually provide that the execution of the lease by the lessor shall, in favour of the lessee and persons deriving title under him, be sufficient evidence of the execution and delivery of the counterpart.

Time of execution. The counterpart need not be executed at the same time as the lease (*p*), though it should be executed within such a period that the execution of the two instruments may be regarded as parts of the same transaction (*q*).

(*i*) *Infra*, p. 183.

(*k*) *Hughes v. Clark*, 1851, 10 C. B. 905; *Houghton v. Kœnig*, 1856, 18 C. B. 235. See *Doe v. Austin*, 1832, 2 Moo. & Sc. 107; *Homes v. Pearce*, 1858, 1 F. & F. 283. See *Burleigh v. Stubbs*, 1793, 5 T. R. 465.

(*l*) *Roe v. Davis*, 1806, 7 East, 363, 364; *Pearse v. Morrice*, 1832, 3 B. & Ad. 396. See *Munn v. Godbold*, 1825, 3 Bing. 292, 294.

(*m*) *Paul v. Meek*, 1828, 2 Y. & J. 116.

(*n*) See, e.g., Settled Estates Act, 1877, s. 4; Settled Land Act, 1882, s. 7; Conveyancing Act, 1881, s. 18; 11 Geo. 4 & 1 Will. 4, c. 65, s. 17, as to infants; 5 & 6 Vict. c. 108, ss. 1, 4, as to ecclesiastical corporations.

(*o*) Sugden, Powers, 8th ed. 826.

(*p*) *Fryer v. Coombs*, 1840, 11 A. & E. 403.

(*q*) Sugden, Powers, 8th ed. p. 827.

If a lease and counterpart are inconsistent, and the lease is consistent with itself, the provisions of the lease, which for this purpose is considered as the principal instrument, will prevail (*r*). But if the lease be inconsistent with itself, it may be corrected by reference to the counterpart (*s*).

Where copies of a lease are each executed by both lessor and lessee they are termed duplicates. The holder of an original duplicate of a lease has all the remedies which the possession of the original lease would give him, since the duplicate original of a deed is primary evidence (*t*).

The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor) is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

Stamp Act, 1891, s. 72.
Denoting stamp necessary.

DUPLICATE OR COUNTERPART of any instrument chargeable with any duty—	<i>Id.</i> , Schedule. Amount of

Where such duty does not amount to 5s. $\left\{ \begin{array}{l} \text{The same duty} \\ \text{as the origi-} \\ \text{nal instru-} \\ \text{ment.} \end{array} \right.$

											£	s.	d.
In any other case	.	.	.	.	.	.	.	.	.	.	0	5	0

Hence the counterpart of an instrument chargeable as a lease, if stamped with 5s., or the proper *ad valorem* lease duty if less than 5s., is admissible in evidence without a stamp denoting payment of the duty on the lease; but a duplicate must bear a denoting stamp (*u*). The denoting stamp is affixed on application to the Inland Revenue Commissioners, and on production of both the instruments (*u*).

(6) MATTERS RELATING TO THE COMPLETION OF LEASES.

Execution and Delivery.

Leases by deed should be signed, sealed and delivered (x) Execution of
by the parties, or their agents, duly authorized by power leases by deed.

(r) Shep. Touch. p. 53; *Burchell v. Clark*, 1876, 2 C. P. D. 88. See pp. 93, 95, 97.

(s) *Burchell v. Clark*, *supra*.

(t) *Colling v. Treweek*, 1827, 6 B. & C. p. 398.

(u) Stamp Act, 1891, s. 11.

(x) Leases under the seal of a corporation need no delivery : 2 Rol.

of attorney under seal (*y*). In the absence of stipulation, the lessor is not entitled to insist on witnessing by himself or his agent the execution of the counterpart by the lessee (*z*).

It seems, however, that signature, though usual and desirable, is not essential to leases by deed (*a*), unless it is required under the special enactment or power under which the lease is made. No formal mode of delivery is necessary. A deed may be delivered either by handing it over to the party to whom it is made, without words, or by words without any act of delivery (*b*).

Escrow.

The delivery may be qualified by express words, so as to prevent it from operating until the performance of some condition, as, for instance, the payment of a sum of money; and in that case the deed is said to be delivered as an escrow (*c*); and delivery as an escrow may be inferred from circumstances (*d*). As a general rule, the delivery as an escrow must not be made to the lessee or grantee himself (*e*); but it may be made to a solicitor acting on behalf of all parties to the deed (*f*), even though he is one of the grantees, provided the delivery is made to him in his character as solicitor (*g*); or to the solicitor acting for the lessee or grantee (*h*). Where there are two or more lessors or grantors, delivery as an escrow may be made by one of them to another (*h*). The question whether an instrument

Abr. 23, l. 50; but it has been held that no immediate interest passes unless they are sealed with that intent: *Derby Canal Co. v. Wilmot*, 1808, 9 East, 360.

(*y*) *Supra*, p. 70.

(*z*) *Borradaile v. Smart*, 1857, 5 W. R. 270. Cf. as to sales, *Viney v. Chaplin*, 1858, 4 Drew. 237; 2 De G. & J. 468; *Essex v. Daniel*, 1875, L. R. 10 C. P. 538; Conv. Act, 1881, s. 8.

(*a*) *Cherry v. Heming*, 1849, 4 Ex. 631; *Taunton v. Pepler*, 1821, 6 Mad. 166; *Arelina v. Whisson*, 1842, 4 M. & Gr. 801. See *Cooch v. Goodman*, 1842, 2 Q. B. p. 596; Shep. Touch. 56, note 24, by Preston.

(*b*) Co. Litt. 36 a.

(*c*) See *Pattle v. Hornibrook*, 1897, 1 Ch. 25.

(*d*) *Bouker v. Burdekin*, 1843, 11 M. & W. 128; *Gudgen v. Besset*, 1856, 6 E. & B. 986.

(*e*) Co. Litt. 36 a; *Thoroughgood's Case*, 1612, 9 Rep. p. 137 a; *Whyddon's Case*, 1597, Cro. Eliz. 520; *Williams v. Green*, 1601, *ib.* 884. See *Pym v. Campbell*, 1856, 25 L. J. Q. B. p. 279; *contra*, *Hawksland v. Gatchel*, 1600, Cro. Eliz. 835.

(*f*) *Millership v. Brookes*, 1860, 5 H. & N. 797.

(*g*) *London Freehold Property Co. v. Suffield*, 1897, 2 Ch. 608.

(*h*) *Watkins v. Nash*, 1875, 20 Eq. 262.

has been executed as an escrow is one of fact for the jury, unless reliance is placed on a document accompanying the deed, when the matter is one of construction for the Court (*i*).

It is desirable that leases by deed should be attested, but, unless the deed is made in exercise of a power (*k*), the want of attestation will not render it void (*l*). Leases of land in Middlesex and Yorkshire should, however, be attested, at least by one, and perhaps by two witnesses, since otherwise a memorial of them cannot be registered (*m*). Attestation.

Until the lessor has executed the lease, the lessee is not bound by the covenants to repair or to pay rent, because until then he has not the consideration for which he has stipulated (*n*). And *a fortiori* in such a case the covenants cannot be enforced by the devisee of the lessor, for the lessee has at law a mere tenancy at will which ceases on the death of the lessor (*o*). Though where the agreement is capable of specific performance, it seems that this doctrine would not now hold good (*p*). Where there is a demise purporting to be by tenant for life and remainderman, "according to their respective estates and interests," and only the tenant for life executes, he may sue on the covenants (*q*). Effect of non-execution by lessor.

If any alteration is made in a lease after it has been executed (*r*) by the lessor and lessee, it will require a fresh stamp; unless, perhaps, in cases where such alteration is made with the consent of both parties, and is merely an expression of what was before implied, as, for instance, the addition of the words "house and buildings" to a proviso for giving up a farm (*s*). And, generally, a fresh stamp is Effect of alterations in a lease after execution.

(*i*) *Furness v. Meek*, 1857, 27 L. J. Ex. 34. See *Ponsford v. Walton*, 1868, L. R. 3 C. P. 167, 174.

(*k*) See 22 & 23 Vict. c. 35, s. 12. *Supra*, p. 58.

(*l*) 2 Black. Com. 307.

(*m*) See Land Registry (Middlesex Deeds) Act, 1891, Sched. I., r. 2, and Rules of 1892, r. 6; 47 & 48 Vict. c. 54, s. 6 (Yorkshire).

(*n*) *Swatman v. Ambler*, 1852, 8 Ex. 72; *Pitman v. Woodbury*, 1848, 3 Ex. 4. See *Toler v. Slater*, 1867, L. R. 3 Q. B. p. 45.

(*o*) *Cardwell v. Lucas*, 1836, 2 M. & W. 111.

(*p*) *Supra*, p. 81.

(*q*) *How v. Greek*, 1864, 3 H. & C. 391. As to defect of acknowledgment in a lease by husband and wife of the wife's lands, see *Toler v. Slater*, 1867, L. R. 3 Q. B. 42.

(*r*) An alteration made in a lease by deed, after the deed is signed, but before it is sealed and delivered, is part of the deed: *Lyburn v. Warrington*, 1816, 1 Stark. 162.

(*s*) *Doe v. Houghton*, 1827, 1 Man. & Ry. 208.

required for a document which varies the original agreement so far as to form a new or substituted contract (*t*). So a memorandum indorsed on a lease after it has been executed must be stamped as a new instrument (*u*).

If a deed is altered, after execution, in a material point by one party without the privity of the other, it thereby becomes void (*x*), but not if the alteration is immaterial (*y*). If an agreement for a lease be vitiated by alteration, it may be received in evidence to show the terms of occupation (*z*); and a deed may be received where the alteration does not affect the matter which the deed is produced to prove (*a*). Since a deed cannot, save with the consent of the parties, be altered after execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution (*b*). An alteration made before execution by the lessor and lessee does not affect the validity of the deed, although it has been previously executed by other persons parties thereto, provided that such parties are not affected (*c*).

When a memorandum is added to a lease previously to execution so as to be incorporated in it, the whole constitutes one entire instrument (*d*), and if there is a variance the memorandum will control the lease (*e*).

Where an agreement for a tenancy from year to year is altered to one for a term of one year, the alteration is treated as extending to covenants which are applicable only to a yearly tenancy, and these are considered as expunged or as only operative in the event of the tenancy continuing (*f*).

(*t*) *Atherstone v. Bostock*, 1841, 2 M. & Gr. 511.

(*u*) *Reed v. Deere*, 1827, 7 B. & C. 261; *Hill v. Patton*, 1807, 8 East, 373; *French v. Patton*, 1808, 9 East, 351.

(*x*) *Pigot's Case*, 1615, 11 Rep. 26 b.

(*y*) *Aldous v. Cornwell*, 1868, L. R. 3 Q. B. 573. See notes to *Master v. Miller*, 1 Sm. L. C. 10th ed. 747.

(*z*) *Hutchins v. Scott*, 1837, 2 M. & W. 809.

(*a*) *E. of Falmouth v. Roberts*, 1842, 9 M. & W. 469.

(*b*) *Doe v. Catomore*, 1851, 16 Q. B. 745.

(*c*) *Hall v. Chandless*, 1827, 4 Bing. 123.

(*d*) See *Griffin v. Stanhope*, 1618, Cro. Jac. p. 456.

(*e*) *Weak v. Escott*, 1821, 9 Price, 595. But see *Frogley v. E. Lovelace*, 1859, Johns. 333.

(*f*) *Strickland v. Maxwell*, 1834, 2 Cr. & M. 539.

Registration.

A memorial of a lease by deed of lands situate in the counties of Middlesex (*k*) or York, including the town of Kingston-upon-Hull, should be entered on the respective registers provided for the purpose; unless in Middlesex the lease is at a rack-rent, or unless in either county it does not exceed twenty-one years, and is accompanied by actual possession, *i.e.* where the lessee is also the occupier of the premises (*l*).

Registration.
7 Anne,
c. 20 (*g*), and
54 & 55 Viet.
c. 64 (*h*)
(Middlesex);
47 & 48 Viet.
c. 54 (*i*)
(Yorkshire
and Hull).

Registration of an assignment will not supply the want of registration of the lease (*m*). It would seem that a lease which binds the lessee to build or execute improvements on the demised land cannot be considered a lease at a rack-rent within the exception of these Acts (*n*). It has been suggested that a lease is within the exception notwithstanding that the rent ceases to be a rack-rent in consequence of the increase in the value of the property (*o*); but the doctrine cannot safely be acted on (*n*).

Copyholds are excepted from the Registry Acts, but it is necessary to register such leases of copyhold estates as would require registration if the estate were freehold, the lease not being a copyhold interest (*p*).

Under 15 Car. 2, c. 17, s. 8, no lease of lands within the Bedford Level, except leases for seven years or under in possession, is of any force but from the time it is entered with the registrar. But, notwithstanding the general terms of this enactment, failure to register does not avoid the lease as between the parties: it only postpones it to persons deriving title subsequently and registering (*q*).

(*g*) The Middlesex Registry Act, 1708.

(*h*) The Land Registry (Middlesex Deeds) Act, 1891. As to the form of the memorial, see Schedule I. to this Act, and the Rules of 1892; *Reg v. Registrar of Middlesex*, 1850, 15 Q. B. 976.

(*i*) The Yorkshire Registries Act, 1884.

(*k*) Instruments relating to leases of chambers in the Inns of Court are exempted from the provisions of 7 Anne, c. 20. See sect. 17.

(*l*) *Dart's V. & P.* 6th ed. II. 769. See *Fury v. Smith*, 1822, 1 Huds. & Br. 735, 751.

(*m*) *Honeycomb v. Waldron*, 1737, 2 Str. 1064.

(*n*) *Dart's V. & P.* II. 769.

(*o*) *Sugd. V. & P.* 14th ed. 732.

(*p*) See *Sugd. V. & P.* 14th ed. 732; *Rigge on Registration of Deeds*, 87, note (*m*).

(*q*) *Hodson v. Sharpe*, 1808, 10 East, 350.

Registration
under the
Land
Transfer Acts.

Registration of title to leasehold land is governed by the Land Transfer Acts, 1875 and 1897 (*r*), and by the Land Transfer Rules, 1898 (*s*), and is either voluntary or compulsory. The effect is that a person entitled to leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired, may, if he so chooses, be registered as proprietor of the leasehold land either with an absolute, qualified, or possessory title (*t*). And in any district where registration has become compulsory an assignment on sale of a lease or an underlease, having at least forty years to run, or two lives yet to fall in ; and a grant of a lease or underlease for a term of forty years or more, or for two or more lives, capable of registration, operate only as agreements and do not pass any legal estate to the assignee or lessee unless or until he is registered as proprietor of the lease or underlease (*u*). When leasehold land has once been registered, transfers of it must be made in the manner prescribed by the rules, and must be registered (*v*).

Where freehold or leasehold land has been registered, the registered title is subject to any leases or agreements for leases and other tenancies for terms not exceeding twenty-one years, or for any less estate, provided there is an occupation under such tenancies (*x*). There is no necessity, therefore, to enter notice of such tenancies on the register. But where the term is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with the lease or agreement, notice of the lease or agreement should be entered on the register against the lessor's title (*y*).

(*r*) 38 & 39 Vict. c. 87 ; 60 & 61 Vict. c. 65.

(*s*) The Rules repeal sects. 12, 14, 15, 16, 36, and 37 of the Act of 1875 entirely, and sects. 11 and 34 partially (*r*. 57).

(*t*) Act of 1875, sects. 11, 13 ; rr. 43 to 56. A sub-lease is, but a term created for mortgage purposes is not, to be deemed a lease within the meaning of sect. 11 : Act of 1897, Sched. I.

(*u*) Land Transfer Rules, 1898, rr. 58, 59.

(*v*) Act of 1875, sects. 34, 35, 38, and 39 ; Act of 1897, Sched. I. ; Rules of 1878, rr. 91 to 93.

(*x*) Act of 1875, sect. 18 (7).

(*y*) Act of 1875, sect. 50 ; Act of 1897, Sched. I.

Custody of Lease.

During the continuance of the demise, the instrument of lease belongs to the lessee, and the counterpart to the lessor (*z*); and the lessee is entitled to possession of the lease after his interest in the demised premises has expired or been determined by forfeiture (*a*)—at any rate, where the lease contains covenants by the lessor (*z*). Where a lease is in the hands of the tenant, and no counterpart can be found, it seems that the landlord is entitled to inspect and take a copy of the lease (*b*). If an occupier against whom an action of ejectment for a forfeiture is brought has no duplicate or copy of the lease under which the claim is made, he may, independently of the Evidence Act, 1851 (*c*), obtain from a judge an order to inspect and take a copy of the lease (*d*).

Custody of
lease.

Costs.

The usual course is for the lessor's solicitor to prepare the lease, and for the lessee to pay the costs (*e*). If the lease is prepared by the solicitor of the lessor, who is not employed by the lessee for that purpose, the lessor is the person liable, in the first instance, to pay the solicitor, but the lessor can recover the amount from the lessee whether the lessee takes up the lease or refuses to do so (*f*), and slight evidence will be accepted to make the lessee liable directly to the lessor's solicitor, *e.g.* if he has himself given instructions to the solicitor (*g*). Where an agreement provides that a lease shall be prepared at the sole expense of the lessor, the lessor prepares it as well as pays for it (*h*).

Costs of
preparing
lease.

The lessor must bear the expense of the counterpart unless the lessee has expressly agreed to pay for it (*i*).

(*z*) See judgment in *Hall v. Ball*, 1841, 3 M. & Gr. p. 253.

(*a*) *Hall v. Ball*, 3 M. & Gr. 242; *Elworthy v. Sandford*, 1864, 3 H. & C. 330.

(*b*) *Doe v. Slight*, 1832, 1 Dowl. 163, overruling *Woodcock v. Worthington*, 1827, 2 Y. & J. 4; *Portmore v. Goring*, 1827, 4 Bing. 152. See *Elworthy v. Sandford*, 34 L. J. Ex. 44, per Martin, B.

(*c*) 14 & 15 Vict. c. 99, s. 6. (*d*) *Doe v. Roe*, 1852, 1 E. & B. 279

(*e*) *Grissell v. Robinson*, 1836, 3 Scott, 329; 3 Bing. N. C. 10.

(*f*) *Baker v. Meryweather*, 1849, 2 C. & K. 737; *Grissell v. Robinson*, *supra*.

(*g*) *Smith v. Clegg*, 1858, 27 L. J. Ex. 300; *Webb v. Rhodes*, 1837, 3 Bing. N. C. 732.

(*h*) *Price v. Williams*, 1836, 1 M. & W. p. 13.

(*i*) *Jennings v. Major*, 1837, 8 C. & P. 61. See *Re Negus*, 1895, 1 Ch. 73, p. 81.

Frequently, however, the lessee agrees to pay all the costs of both lease and counterpart, and he is entitled to have the bill taxed (*j*).

- Remuneration Order. The costs of the lessor's and lessee's solicitors respectively are regulated by the General Order under the Solicitors' Clause II. (*l*). Remuneration Act, 1881 (*k*). In respect of leases and agreements for leases (other than mining leases), when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part 2 of Schedule I. In Clause II. (*c*). respect of business not completed, and in respect of mining leases or licences or agreements therefor, and of assignments of leases not by way of purchase or mortgage, the remuneration is to be regulated according to the system existing before the Order as altered by Schedule II. Clause VI. But in cases where Schedule I. applies, a solicitor may, before undertaking any business (*l*), by writing under his hand, communicated to his client, elect to be remunerated according to the former system as altered by Schedule II.

The fee prescribed by Schedule I., Part 2, to be paid to the lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration in respect of negotiations which lead up to, and the preparation of the agreement which precedes, the lease (*m*); but it does not include negotiations carried on by the solicitor as to the letting of property with persons other than the person to whom the lease is ultimately granted (*n*).

- Agreements for leases. The term "agreements for leases" as used in the schedule means agreements on which the parties intend to rely as sufficient for the purpose of stating the terms on which the property was held without having formal leases executed (*o*); and it includes an agreement for a tenancy for less than three years at a rack-rent, although such an agreement need not be in writing (*p*).

(*j*) *Re Newman*, 1867, 2 Ch. 707.

(*k*) 44 & 45 Vict. c. 41.

(*l*) *Re Allen*, 1886, 34 Ch. D. 433.

(*m*) *Savery v. Enfield Local Board*, 1893, A. C. 218; *Re Field*, 1885, 29 C. D. 608; *Re Emanuel and Simmonds*, 1886, 33 C. D. 40.

(*n*) *Re Martin*, 1889, 41 C. D. 381.

(*o*) *Re Emanuel and Simmonds*, 1886, 33 C. D. 40, per Cotton, L.J., at p. 47.

(*p*) *Re Negus*, 1895, 1 Ch. 73.

The scale does not apply unless the work in respect of which the fee is prescribed has been substantially done (*q*), and the fees for leases do not apply to a transaction which, though carried out by means of a lease, is substantially a sale (*r*).

The further remuneration payable under rule 5 of the rules applicable to Part 2 of Schedule I., where the consideration consists partly of a money payment or premium (*s*), does not entitle the solicitor to claim the negotiating fee as on a sale (*t*); but otherwise it gives him exactly the same remuneration as he could claim under Part I. of the schedule on a sale (*u*), and where the rent and the premium are small, he is entitled to the minimum fee on each (*x*).

Premium.

Entry.

At common law no lease for years, whether with or without any reservation of rent, is complete till actual entry has been made by the lessee (*y*). A lease in the usual form, which is a common law demise, does not of itself vest any estate in the lessee, but only gives him a right of entry on the tenement, called his interest in the term, or *interesse termini* (*z*).

Entry of lessee.

The right under a lease to commence immediately (not being a lease the possession under which is executed by the Statute of Uses) is, until entry by the lessee, an *interesse termini* only, and so is the right under a lease to commence at a future time, as upon the expiration of an existing lease (*a*); and the same rules are applicable to both. Each

Future lease.

(*q*) *Re Lacey and Son*, 1883, 25 C. D. 301, per Cotton, L.J., at p. 309; *Re Hickley and Steward*, 1885, 33 W. R. 320; *Wellby v. Still*, 1895, 1 Ch. 524.

(*r*) As where a sale of part of property held under a lease is carried out by means of an underlease: *Still v. Webb*, 1895, 45 W. R. 170.

(*s*) *Re Hastings and Crawford*, 1888, 36 W. R. 572.

(*t*) *Re Horn and Francis*, 1896, 2 Ch. 797.

(*u*) *Re Robson*, 1890, 45 C. D. 71.

(*x*) *Re Hellard and Bewes*, 1896, 2 Ch. 229.

(*y*) Bac. Abr. (M.) p. 844.

(*z*) 2 Black. Com. 144; Co. Litt. 46 b. See judgment in *Copeland v. Stephens*, 1818, 1 B. & A. at p. 605.

(*a*) *Joyner v. Weeks*, 1891, 2 Q. B. 31. Hence a lease made to commence after the expiration of a previous lease does not operate as an assignment of the reversion expectant on such lease, but only confers an *interesse termini* until its expiration: *Smith v. Day*, 1837, 2 M. & W. 684; *Blatchfield v. Cole*, 1858, 5 C. B. N. S. 514.

is a *right* only, not an *estate*. The whole estate, notwithstanding such right, remains in the lessor. It follows that in neither case will an assignment by the lessee to the lessor operate as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate; though such a release will avail to extinguish the rent, if any, reserved upon the lease (*b*). The right may be extinguished by a release by the lessee to the lessor (*c*), and may be granted as a right by the lessee to any other person (*d*); but it cannot be conveyed as an estate. Hence, if the future lessee attains a present freehold estate in the premises, his lease in reversion will not be merged (*e*); and since the lessor, after granting a future lease, retains his reversion, he continues entitled to distrain for rent due from the first lessee (*f*).

Concurrent
lease.

A concurrent lease differs in this respect from a lease in reversion, and, if granted by deed, it transfers the immediate reversion (*g*), and the lessor cannot afterwards, during the continuance of the second lease, recover rent against the first lessee (*h*). But the concurrent lease, if made by parol, and if it is for a term less than the term of the original lease, is absolutely void, and though the original lease affected only part of the premises included in the concurrent lease, the rent due under the latter cannot be apportioned (*i*).

A lease to two persons at a time when one of them is in possession as tenant from year to year vests the possession in both, and does not give a mere *interesse termini* (*k*).

Effect of
entry.

At any time during the term, even after the death of the lessor, the lessee or his assignee, or personal representatives, may perfect the lease by entry (*l*). Until this has been done, neither the lessee nor his assignee can maintain an action of trespass in respect of the demised

(*b*) Co. Litt. 46 b, 270 a. See *Hyde v. Warden*, 1877, 3 Ex. D. 72, 84.

(*c*) Judgment in *Doe v. Walker*, 1826, 5 B. & C. at p. 118. See *Saffin's Case*, 1606, 5 Rep. 123 b.

(*d*) Co. Litt. 46 b. (*e*) *Doe v. Walker*, 1826, 5 B. & C. 111.

(*f*) *Smith v. Day*, 1837, 2 M. & W. 684. See per Parke, B., 694, 699.

(*g*) Bac. Abr. (N.) p. 848; Shep. Touch. p. 276; *Palmer v. Thorpe*, 1889, Cro. Eliz. 152.

(*h*) *Harmer v. Bean*, 1853, 3 C. & K. 307.

(*i*) *Neale v. Mackenzie*, 1836, 1 M. & W. 747.

(*k*) *Keyse v. Powell*, 1853, 2 E. & B. 132.

(*l*) Co. Litt. 46 b; *Copeland v. Stephens*, 1818, 1 B. & A. at p. 606.

premises (*m*) ; but he may bring an action of ejectment (*n*). An action for use and occupation cannot be maintained against him until he has entered (*o*).

(7) RECTIFICATION OF LEASE.

A lease will be rectified where it was executed under a mutual mistake (*p*), but it has been held that parol evidence of mistake, if denied, must be corroborated by writing (*q*). Where there is a mistake on one side only, the party mistaken is not entitled to have the lease rectified, but he may have it rescinded, unless the other party consents to rectification (*r*). Where a lease is executed in accordance with a written contract, it cannot be rectified on evidence of an agreement outside the contract (*s*).

(*m*) *Bac. Abr. (M.)* p. 844 ; *Turner v. Cameron's, &c. Co.*, 1850, 5 Ex. 932 ; *Wheeler v. Montefiore*, 1841, 2 Q. B. 133 ; *Harrison v. Blackburn*, 1864, 17 C. B. N. S. 678. See *Wallis v. Hands*, 1893, 2 Ch. 75, distinguishing *Gillard v. Cheshire Lines Committee*, 1884, 32 W. R. 943.

(*n*) *Doe v. Day*, 1842, 2 Q. B. 147. See *Harrison v. Blackburn*, *loc. cit.*, p. 693.

(*o*) *Edge v. Trafford*, 1831, 1 Cr. & J. 391 ; *Lowe v. Ross*, 1850, 5 Ex. 553. See *Tourne v. D'Heinrich*, 1853, 13 C. B. 892.

(*p*) *Paget v. Marshall*, 1884, 28 C. D. 255 ; *Murray v. Parker*, 1854, 19 Beav. 305. As to rectifying a lease of an infant's property, see *Seaton v. Staniland*, 1862, 4 Giff. 61. As to setting aside a lease for concealment of a fact touching the title, see *Mostyn v. West Mostyn, &c. Co.*, 1876, 1 C. P. D. 145.

(*q*) *Mortimer v. Shortall*, 1842, 2 Dr. & War. 363.

(*r*) *Garrard v. Frankel*, 1862, 30 Beav. 445 ; *Paget v. Marshall*, *supra* ; *D. of Sutherland v. Heathcote*, 1892, 1 Ch. 475.

(*s*) *Davies v. Fitton*, 1842, 2 Dr. & War. 225.

CHAPTER IV.

TERMS OF TENANCY (a).

	PAGE
SECT. I. RENT	188
(1) What may be reserved as rent	188
(2) Payments which are not rent	189
(3) When rent is payable	191
(4) Where payable	194
(5) To whom payable	195
(6) Amount payable	198
Increased rent	199
Deductions from rent	201
Premises destroyed by fire, etc.	207
Eviction	209
(7) Apportionment	211
In respect of estate	211
In respect of time	213
(8) Payment	215
(9) Effect of payment	216
(10) Remedies for recovery of rent (a)	216
SECT. II. REPAIRS	308
SECT. III. WASTE	323
SECT. IV. MODE OF USING PREMISES	330
SECT. V. CULTIVATION OF LAND	344
SECT. VI. FENCES	352
SECT. VII. TREES	355
SECT. VIII. INSURANCE	357
SECT. IX. TAXES	360
SECT. X. QUIET ENJOYMENT	369
SECT. XI. LIVE STOCK	377
SECT. XII. GAME	378
SECT. XIII. UNDERLEASES	384

SECT. I.—RENT.

(1) WHAT MAY BE RESERVED AS RENT.

Need not be money.

It is not essential that rent should consist of the payment of money. The delivery of hens, horses, wheat (b), &c., may constitute a rent (c), and so also may the performance of personal services, such as shearing sheep (d), carrying coals (e), or cleaning a church (f). The reservation of suit

(a) For full tables of contents, see under the respective headings.

(b) As to the construction of corn rents, see *St. Cross v. De Walden*, 1795, 6 T. R. 338, 343.

(c) Co. Litt. 142 a. See *Pitcher v. Tovey*, 1692, 4 Mod. 71.

(d) Co. Litt. 96 a.

(e) *Doe v. Morse*, 1830, 1 B. & Ad. 365. See *Lanyon v. Carne*, 1668, 2 Saund. 165, 167; *D. of Marlborough v. Osborn*, 1864, 5 B. & S. 67.

(f) *Doe v. Benham*, 1845, 7 Q. B. 976.

to the mill of the lessor, by sending to be ground there all corn grown on the demised premises, is a reservation in the nature of rent (*g*).

Parcel of the annual profits of the premises demised, as, for instance, the herbage of land, cannot be reserved as rent (*h*). A royalty payable to the owner of a brickfield upon the bricks made is, however, a rent, although paid for land which is in course of being wholly consumed (*i*).

Must not be part of demised premises.

(2) PAYMENTS WHICH ARE NOT RENT.

The following payments are not, properly speaking, rent, and, though recoverable by action, cannot be distrained for, unless an express power to distrain is contained in the lease :

Payments reserved by way of rent on a lease of an incorporeal hereditament (*j*), such as an advowson or tithes (*k*), or a franchise or liberty, *e.g.* a fair or market (*l*). But a single rent reserved upon a lease by deed (*m*) of land and tithes is good, since the rent, although payable for the land and tithes, is held to issue out of the land alone (*n*). But rent may be reserved out of reversions and remainders (*o*), and the sovereign may reserve a rent out of any incorporeal hereditament (*o*).

1. Sums reserved on leases of incorporeal hereditaments.

Payments reserved by way of rent on a lease of personal chattels (*p*). But a mixed payment of rent for land and goods will be held to issue out of the land alone (*q*) ; hence

2. Sums reserved on leases of chattels.

(*g*) *Vyryan v. Arthur*, 1823, 1 B. & C. 410.

(*h*) Co. Litt. 142 a ; 2 Black. Com. 41.

(*i*) *Reg. v. Westbrook*, 1847, 10 Q. B. 178, 203 ; *Reg. v. Everist, ib.* See *Daniel v. Gracie*, 1844, 6 Q. B. 145 ; *Barrs v. Lea*, 1864, 33 L. J. Ch. 437.

(*j*) Co. Litt. 47 a ; *Gardiner v. Williamson*, 1831, 2 B. & Ad. 336 ; *Buzzard v. Capel*, 1828, 8 B. & C. 141, per Lord Tenterden, C.J., p. 150 ; on appeal, 6 Bing. 150. As to sums made payable upon a grant of a wayleave to a railway company in respect of traffic passing over the line, see *Lord Hastings v. N.E. Ry. Co.*, 1898, 78 L. T. 812.

(*k*) See *Dean of Windsor v. Gover*, 1671, 2 Saund. 302. But as to lease of advowson, see *supra*, p. 2.

(*l*) *Jewel's Case*, 1587, 5 Rep. 3 a.

(*m*) See *Gardiner v. Williamson*, *supra*.

(*n*) *Smith v. Bowles*, 1618, 2 Rol. Abr. 451.

(*o*) Co. Litt. 47 a ; see note 284.

(*p*) *Spencer's Case*, 1583, 5 Rep. at p. 17 a.

(*q*) *Collins v. Harding*, 1598, Cro. Eliz. at p. 607 ; *Farewell v. Dickenson*, 1827, 6 B. & C. 251.

rent for furnished lodgings (*r*), or for the exclusive occupation of part of a room (*s*), or part of a mill (*t*), together with a supply of steam power and gas, may be distrained for. It seems, however, that if the house and goods pass to different persons, either the rent will be apportioned, or an agreement inferred to hold the house at a reasonable rent, and to pay compensation for the use of the furniture (*u*).

3. Sums reserved on a mere licence.

Payments reserved by way of rent on a mere licence to use premises for a particular purpose (*x*). A distress cannot be made for rent reserved on a letting of a standing for machinery, with a supply of steam power (*y*), unless the letting is of a defined portion of a room in a factory, partitioned off from the rest, with the intention of giving the exclusive occupation to the person to whom it is let (*z*).

4. Sums reserved on a mere agreement for a lease.

Payments reserved by way of rent on a mere agreement for a lease, where no tenancy has been created by payment of rent or otherwise (*a*), unless the tenant is in possession under an agreement which is capable of specific enforcement, in which case it is now equivalent to a lease (*b*); but an undertaking to hold the land at a rent till the lease is granted will make the lessee liable for rent, although no lease is granted or possession taken (*c*).

Where a tenant holds over after notice to quit given by the landlord, rent subsequently accruing due cannot be distrained for until a new tenancy has been expressly or impliedly created (*d*).

5. Additional rent for improvements.

Payments by way of increased rent which a tenant under a lease for a term of years agrees with his lessor to make during the remainder of the term, in consideration of the

(*r*) *Newman v. Auderton*, 1806, 2 B. & P. N. R. 224.

(*s*) *Selby v. Greaves*, 1868, L. R. 3 C. P. 594.

(*t*) *Marshall v. Schofield*, 1882, 52 L. J. Q. B. 58.

(*u*) *Salmon v. Matthews*, 1841, 8 M. & W. 827.

(*x*) See *supra*, p. 85.

(*y*) *Hancock v. Austin*, 1863, 14 C. B. N. S. 634.

(*z*) *Selby v. Greaves*, 1868, L. R. 3 C. P. 594.

(*a*) *Hegun v. Johnson*, 1809, 2 Taunt. 148; *Dunk v. Hunter*, 1822, 5 B. & A. 322; *Reguart v. Porter*, 1831, 7 Bing. 451. See *supra*, p. 94.

(*b*) *Walsh v. Lonsdale*, 1882, 21 C. D. 9; *supra*, p. 81.

(*c*) *Adams v. Hagger*, 1879, 4 Q. B. D. 480.

(*d*) *Alford v. Vickery*, 1842, Car. & M. 280; *Jenner v. Clegg*, 1832, 1 Moo. & R. 213; *supra*, p. 95.

lessor's executing improvements on the demised premises (*e*). Though the word rent is used, the agreement is held to amount only to a personal contract to pay an additional sum yearly (*f*). Such an agreement does not relate to an interest in land within the Statute of Frauds, and consequently may be by parol (*g*).

Payments agreed to be made by the lessee to the lessor annually, "over and above the rent" (*h*), unless they are included in the reservation (*i*).

Payments by way of rent reserved upon the assignment of a lease (*k*). In such a case there is no reversion in the assignor, and therefore there can be no distress for the rent. But, apart from the question of distress, the assignment operates as an underlease, and debt lies for the rent (*l*).

Payments by way of rent reserved to a stranger to the reversion (*m*). But such a reservation may be good by estoppel (*n*); and it seems that the sovereign may reserve rent to a stranger (*o*).

6. Payments "over and above the rent."

7. Payments reserved upon the assignment of a lease.

8. Payments reserved to a stranger.

(3) WHEN RENT IS PAYABLE.

A yearly rent is payable only once in a year, and not until the end of the year (*p*), unless the reservation be qualified by subsequent words, making the rent payable in advance (*q*), or at shorter intervals than a year, as, for instance, half-yearly or quarterly (*r*), or unless the agreement

1. Where there is no express stipulation as to days of payment.

(*e*) *Hoby v. Roebuck*, 1816, 7 Taunt. 157; *Donellan v. Read*, 1832, 3 B. & Ad. 899; *Lambert v. Norris*, 1837, 2 M. & W. 333. See *Foquet v. Moor*, 1852, 7 Ex. 870.

(*f*) See judgment in *Donellan v. Read*, 3 B. & Ad. at p. 905.

(*g*) *Donellan v. Read*, *supra*.

(*h*) *Smith v. Mapleback*, 1786, 1 T. R. 441, 445.

(*i*) *Barrs v. Lea*, 1864, 33 L. J. Ch. 437.

(*k*) *Witton v. Bye*, 1619, Cro. Jac. 486; *Parmenter v. Webber*, 1818, 8 Taunt. 593; ——— v. *Cooper*, 1768, 2 Wils. 375. See *Langford v. Selnes*, 1857, 3 K. & J. 220.

(*l*) *Poultney v. Holmes*, 1721, 1 Stra. 405; *Preece v. Corrie*, 1828, 5 Bing. 24.

(*m*) Co. Litt. 143 b; *Oates v. Frith*, 1615, Hob. 130; 2 Rol. Abr. 447, pl. 3. See *Gilbertson v. Richards*, 1859, 4 H. & N. 277.

(*n*) See *supra*, p. 74.

(*o*) Co. Litt. 143 b.

(*p*) *Cole v. Sury*, 1627, Latch. 264; *Coomber v. Howard*, 1845, 1 C. B. 440. See *Turner v. Alday*, 1836, Tyr. & G. 819.

(*q*) See *Finch v. Miller*, 1848, 5 C. B. 428; *Hopkins v. Helmore*, 1838, 8 A. & E. 463; *supra*, p. 146.

(*r*) *Coomber v. Howard*, *supra*; *Bishop v. Goodwin*, 1845, 14 M. & W. 260; *R. v. Norwich Incorporation*, 1874, 30 L. T. 704; *Doe v. Golding*,

is so expressed as to show that the time of payment was left indefinite, when the contemporaneous or subsequent dealings of the parties may be given in evidence to show that the rent was to become payable at an earlier period (s). If a man makes a lease on a day intermediate between two quarter-days, as on the 1st of May, reserving rent payable half-yearly, this means half-yearly from the making of the lease (t).

A clause making a lease determinable by notice expiring on any quarter-day will not constitute a quarterly reservation of rent (u).

Sometimes by the custom of the country rent may be due in advance (x).

2. Construc-
tion of express
stipulation.

RENT PAYABLE *quarterly, or half-quarterly, if required.*

Where the landlord has received the rent quarterly for a year, a previous demand is necessary to make it payable half-quarterly (y). A distress in such a case is not equivalent to a demand, and cannot be made before a demand in fact (z).

RENT PAYABLE *quarterly on the usual quarter-days, and always, if required, in advance.* A demand may be made at any moment, and, if not complied with, the lessor may forthwith distrain (a). But if the rent is yearly, and payable in advance, if required, the lessor cannot, after demanding only a quarter's rent, forthwith distrain for a year's rent (b).

RENT PAYABLE *at the "two usual feasts of the year."* Is due at Michaelmas and Lady Day (c).

RENT PAYABLE *from the following Lady Day, upon a parol demise.* Where there is a custom of the country respecting the meaning of "Lady Day," that

1821, 6 Moo. 231; *Tomkins v. Pinsent*, 1702, 2 Ld. Raym. 819. See *Turner v. Allday*.

(s) *Gore v. Lloyd*, 1844, 12 M. & W. 463.

(t) *Gilbert*, Rents, p. 50.

(u) *Collett v. Curling*, 1847, 10 Q. B. 785.

(x) *Buckley v. Taylor*, 1788, 2 T. R. 600. See *Doe v. Weller*, 1837, 1 Jur. 622.

(y) *Mallam v. Arden*, 1833, 10 Bing. 299.

(z) Per Alderson, J., 10 Bing. 300. See *Chapman v. Chapman*, 1628, Cro. Car. 76.

(a) *London and Westminster Loan Co. v. L. & N. W. Ry. Co.*, 1893, 2 Q. B. 49.

(b) *Clarke v. Holford*, 1848, 2 C. & K. 540.

(c) 2 Rol. Abr. 450 (M.) pl. 2.

term is considered *prima facie* as used consistently with the custom, and evidence of such custom is admissible (d).

RENT PAYABLE *on a specified day, or within a certain number of days afterwards.* Is not due, during the continuance of the lease, until the expiration of the last of the days of grace (e). If, however, the lease expires at the specified day, the days of grace are disregarded, and the rent is then due (f). The payment of rent by the lessee upon the day first specified or at any time during the further period will be a good payment.

RENT PAYABLE *at the "feasts of the Annunciation and St. Michael," in a lease made in August.* The words will be transposed, and the first instalment of the rent is payable at Michaelmas (g).

RENT PAYABLE *quarterly, "the first payment to be made on the 25th of March following," in agreement dated 8th September.* Only a quarter's rent is due on 25th March, the first quarter's rent being either forgiven altogether, or postponed to the end of the term (h).

RENT PAYABLE *"yearly and every year during the term by four equal quarterly payments, on 25th March, 24th June, 29th September and 25th December in every year, commencing from 25th March then instant," in a lease for seven years wanting seven days from 25th March, by indenture dated 21st March.* There must be seven payments of the annual rent; the rent will either be treated as a forehand rent, the first payment to be made on entering; or as payable on the days named, although one of them is after the expiration of the term (i).

If a tenant pays his rent before the day on which it is due, the payment is voluntary, and at law does not operate

Payment
before the
rent-day.

(d) *Doe v. Benson*, 1821, 4 B. & A. 588, 589.

(e) *Clun's Case*, 1614, 10 Rep. 127 a, 128 a; *Blunden's Case*, 1598, Cro. Eliz. 565; *Pilkington v. Dalton*, 1598, Cro. Eliz. 575.

(f) See *Barwick v. Foster*, 1610, Cro. Jac. 227, 233; *Yelv.* 167; *Biggin v. Bridge*, 1676, 3 Keb. 534.

(g) *Hill v. Grange*, 1556, Plowden, 164, 171; incorrectly cited in *Mallory's Case*, 5 Rep. 111 b.

(h) *Hutchins v. Scott*, 1837, 2 M. & W. 809, 810.

(i) *Hopkins v. Helmore*, 1838, 8 A. & E. 463.

as a discharge (*k*). Consequently it does not at law save a condition for re-entry on non-payment of rent on the day (*l*). Such a payment is not a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance to the landlord with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent (*m*). Hence a payment on account of rent not due at the time was formerly in equity, and is now generally, a defence as against the lessor and his heirs to an action for the rent (*n*); though, if the lessor dies before the rent is due, his executors will have to account for an apportioned part (*nn*) of the rent to his heir (*o*). But if the lessor has mortgaged his reversion, the payment is ineffectual as to any rent accruing due after the lessee has notice of the mortgage, and the lessee is liable to pay the rent over again (*p*).

Payment on
the rent-day.

The tenant has the whole of the day to pay his rent in, and it is not in arrear until after midnight (*q*); but even at law a payment on the morning of the rent-day is valid as against the heir of the landlord, in case the latter should die on the same day (*r*).

(4) WHERE RENT IS PAYABLE.

Where there
is no express
agreement.

If no other place is appointed by agreement, rent must be paid upon the land demised (*s*); but if the tenant has expressly covenanted to pay rent, it is his duty to seek out the person to whom the rent is to be paid, and to pay it, or tender it to him, on the appointed day (*t*). If the sovereign

On lease by
sovereign.

(*k*) *Clun's Case*, 1614, 10 Rep. 127 a.

(*l*) *Cromwell v. Andrews*, 1583, Cro. Eliz. 15.

(*m*) *De Nicholls v. Saunders*, 1870, L. R. 5 C. P. 589, per Willes, J., at p. 594.

(*n*) *Nash v. Gray*, 1861, 2 F. & F. 391. See *Rockingham v. Penrice*, 1711, 1 P. W. 177; 1 Swanst. 345, note. (*nn*) *Infra*, p. 213.

(*o*) *Rockingham v. Penrice*, *supra*.

(*p*) *De Nicholls v. Saunders*, 1870, L. R. 5 C. P. 589; *Cook v. Guerra*, 1872, L. R. 7 C. P. 132.

(*q*) *Dibble v. Bowater*, 1853, 2 E. & B. 564. See *Duppa v. Mayo*, 1671, 1 Wms. Saund. at p. 287; judgment of Blackstone, J., in *Cutting v. Deroy*, 1776, 2 W. Bl. at p. 1077.

(*r*) *Clun's Case*, 1614, 10 Rep. 127 b.

(*s*) Co. Litt. 201 b; *Boroughes' Case*, 1596, 4 Rep. p. 73 a. See *Rowe v. Young*, 1820, 2 Br. & B. p. 234; *Crouch v. Fastolfe*, 1680, Sir T. Raym. 418.

(*t*) *Haldane v. Johnson*, 1853, 8 Ex. 689, 695.

makes a lease for years reserving rent, without appointing any place for payment, the lessee may pay the rent either at the exchequer or to the bailiffs or receivers authorized by the sovereign to receive it (*u*).

(5) TO WHOM RENT IS PAYABLE.

Upon the death of any person after 31st December, 1897, his real estate devolves upon his personal representatives for the purpose of being administered by them, so far as necessary, in the same manner as personal estate, and then to be transferred to the persons beneficially entitled (*v*). Such transfer may be by assent to a devise or by conveyance, but until it is effected the personal representatives are entitled to receive the rents. In the case of an intestacy, there seems to be no person entitled to receive the rents pending the grant of administration, though, if the solvency of the estate is clear, it is safe to pay them to the heir-at-law (*w*).

1. Real representatives.

A tender to an agent authorized to receive payment is as good as a tender to the landlord in person (*x*). But before paying or tendering rent to an agent the tenant should not only see that the agent has been duly authorized to receive it, but also, in the case of an agent not authorized by power of attorney (*y*), that his authority has not been revoked by the death or bankruptcy of the landlord (*z*). If the landlord has held out a person to the tenant as his agent to receive the rent, he cannot withdraw the agent's authority without giving the tenant notice of such withdrawal (*a*), and until such notice is given the landlord will be bound by the agent's receipts. Hence the landlord's wife, who has acted as his agent on similar occasions before, when her authority was acknowledged, retains such authority till it is countermanded (*b*). A clause in a lease by deed, whereby the

2. Agents.

(*u*) See note (*s*), p. 194. (*v*) Land Transfer Act, 60 & 61 Vict. c. 65, Part I.

(*w*) *Supra*, p. 62.

(*x*) *Goodland v. Blewith*, 1808, 1 Camp. 477, 478. See *infra*, p. 272; Roscoe's Evidence, 16th ed., 662.

(*y*) A tenant paying in good faith under a power of attorney is protected by the Conveyancing Act, 1881, s. 47.

(*z*) As to revocation by lunacy, see *Drew v. Nunn*, 1879, 4 Q. B. D. 661.

(*a*) See *Drew v. Nunn*, 1879, 4 Q. B. D. p. 667; *Trueman v. Loder*, 1840, 11 A. & E. 589.

(*b*) *Browne v. Powell*, 1827, 4 Bing. 230, 232. See *Dodd v. Acklom*, 1843, 6 M. & Gr. 672.

landlord agrees that K., who has no interest in the rent, is to receive all rent from the tenant at all times when it becomes due during the term, and his receipt is to be a full and sufficient discharge from all liability, has been interpreted as a bare authority to receive the rent, and therefore revocable by the landlord upon notice of the revocation to the tenant (c).

3. Mortgagor.
(a) Lease
before mort-
gage.

A tenant under a lease made by a mortgagor before the mortgage is perfectly safe in paying the rent to the mortgagor until he has notice of the mortgage from the mortgagee (d). After the mortgagee has given such notice he is entitled to, and may distrain for, all rent in arrear which has accrued due since the mortgage (e). If after notice given by the mortgagee the tenant pays rent to the mortgagor, without any fraud or misrepresentation on the part of the latter, the payment cannot be recovered by the tenant from the mortgagor (f).

(b) Lease
after mort-
gage.
i. Not under
Conv. Act,
1881.

The position of the tenant under a lease made after the mortgage depends on whether sect. 18 of the Conveyancing Act applies or not. If it does not apply, the tenant may consider the mortgagor as his landlord so long as the mortgagee allows the mortgagor to receive the rents (g). But the mortgagee, if he desires to go into possession, cannot directly enforce payment of rent to himself, for the tenant does not hold under him, nor is a tenancy under the mortgagee created by notice to pay the rent to him (h). The tenancy under the mortgagor continues, and the tenant is estopped from denying it (i). The tenant, however, is liable to be evicted by the mortgagee claiming under title paramount, and if the notice to pay rent to the mortgagee is accompanied by a threat of legal proceedings, the tenant is justified in paying to the mortgagee all rent due since the mortgage, not already paid to the mortgagor, and all rent

(c) *Venning v. Bray*, 1862, 2 B. & S. 502.

(d) 4 Anne, c. 16, s. 10; *infra*, p. 413; *Trent v. Hunt*, 1853, 9 Ex. p. 23.

(e) *Moss v. Gallimore*, 1779, 1 Dougl. 279; *Rogers v. Humphreys*, 1835, 4 A. & E. 299; *Burrows v. Gradin*, 1843, 1 D. & L. 213. See *Whitmore v. Walker*, 1848, 2 C. & K. 615.

(f) *Higgs v. Scott*, 1849, 7 C. B. 63.

(g) Per Bayley, J., in *Pope v. Biggs*, 1829, 9 B. & C. at p. 251.

(h) *Rogers v. Humphreys*, 1835, 4 A. & E. p. 313.

(i) *Alchorne v. Gomme*, 1824, 2 Bing. 54.

subsequently accruing due (*k*). A payment so made under compulsion of law, and in consequence of the default of the lessor, is treated as a payment of the rent due to the lessor (*l*), and may be set up as a satisfaction of such rent without in any way disputing his title (*m*).

The mere fact of the mortgagee's having given notice to the tenant to pay rent to him, not accompanied by actual payment, is, however, no defence to an action or distress for rent by the mortgagor (*n*).

If the lease is made under sect. 18 of the Conveyancing Act, 1881, the legal reversion on the lease is in the mortgagee, and upon his giving notice to the tenant he has the like remedies on the covenants in the lease as though the lease had been granted by himself (*o*).

ii. Under Conv. Act, 1881.

Upon a lease by several joint tenants, one of them may recover the whole rent and give a discharge for it (*p*). Upon a lease by tenants in common, the survivor may sue for the whole rent, although the reservation is to the lessors according to their respective interests (*q*). But if a lessee holding under two tenants in common pays the whole rent to one after notice from the other not to pay it, the tenant in common who gave the notice may distrain for his share (*r*).

4. Co-owners.

Upon an assignment of rent, whether with or without the reversion to which it is incident, the assignee may bring an action of debt for the rent (*s*). A mere authority to pay the rent to a third person, contained in a letter from the lessor addressed to the lessee, where it does not appear that any consideration moves from such third person, is revocable (*t*); but it is otherwise if a consideration

5. Assignees.

(*k*) *Pope v. Biggs*, 1829, 9 B. & C. 245; *Johnson v. Jones*, 1839, 9 A. & E. 809; *Waddilore v. Barnett*, 1836, 2 Bing. N. C. 538.

(*l*) *Underhay v. Read*, 1887, 20 Q. B. D. 209.

(*m*) *Johnson v. Jones*, 1839, 9 A. & E. 809.

(*n*) *Wheeler v. Branscombe*, 1843, 5 Q. B. 373; *Wilton v. Dunn*, 1851, 17 Q. B. 294. See *Hickman v. Machin*, 1859, 4 H. & N. 716.

(*o*) See sect. 10.

(*p*) *Robinson v. Hofman*, 1828, 4 Bing. 562, 565.

(*q*) *Wallace v. McLaren*, 1828, 1 Man. & Ry. 516. See *supra*, p. 64.

(*r*) *Harrison v. Barnby*, 1793, 5 T. R. 246. See *Powis v. Smith*, 1822, 5 B. & A. 850.

(*s*) *Robins v. Cox*, 1661, 1 Lev. 22; *Allen v. Bryan*, 1826, 5 B. & C. 512; *Williams v. Hayward*, 1859, 1 E. & E. 1040, see p. 1050.

(*t*) *Ex parte Hall*, 1879, 10 C. D. 615.

is shown, and the letter then operates as an equitable assignment (*u*).

Rent actually due (*x*) to a judgment debtor may be attached in the hands of his tenant (*y*) by a garnishee order under R.S.C., 1883, Ord. 45.

Tenant not to be prejudiced by payment of rent to grantor before notice.

Although upon a grant of the reversion an attornment to the grantee is not now necessary (*z*), yet the tenant is not prejudiced or damaged by payment of rent to the grantor, or by breach of any condition for non-payment of rent (*a*), before notice is given to him of such grant by the grantee (*b*).

Payment of rent to person not entitled to it.

Payment of rent to a person not entitled to it, with the acquiescence, under a false apprehension, of the person really entitled, has been held not to exonerate the tenant from the duty of paying it to the latter (*c*). Rent paid by mistake, in ignorance of the death of a person for whose life the premises are held, may be recovered back (*d*). And, generally, where the tenant has paid rent to A., who has no title, and is subsequently evicted and ordered to pay mesne profits, he can recover the rents from A. in an action for money had and received (*e*). A representation as to the person entitled to receive rent binds the person making it (*f*).

(6) AMOUNT OF RENT PAYABLE.

Parol variation of rent.

The rent payable under a written agreement cannot be effectually reduced by a parol variation (*g*); and though the variation is followed by payment of the reduced rent, this does not *per se* operate as the creation of a new tenancy (*h*). Nor does a verbal agreement for an increase of rent (*i*),

(*u*) *Knill v. Prowse*, 1884, 33 W. R. 163.

(*x*) *Jones v. Thompson*, 1858, 27 L. J. Q. B. 234.

(*y*) *Mitchell v. Lee*, 1867, L. R. 2 Q. B. 259. (*z*) *Infra*, p. 413.

(*a*) The necessity for notice of a grant of the reversion before re-entry is confined to the case of re-entry for non-payment of rent: *Scaltock v. Harston*, 1875, 1 C. P. D. 106.

(*b*) 4 Anne, c. 16, sect. 10. As to the sufficiency of the notice, see *Cook v. Guerra*, 1872, L. R. 7 C. P. 132, 137.

(*c*) *Williams v. Bartholomew*, 1798, 1 B. & P. 326.

(*d*) *Barber v. Brown*, 1856, 1 C. B. N. S. 121.

(*e*) *Newsome v. Graham*, 1829, 10 B. & C. 234.

(*f*) *White v. Greenish*, 1861, 11 C. B. N. S. 209.

(*g*) *Crowley v. Vittey*, 1852, 7 Ex. 319. See *Hilton v. Goodhind*, 1827, 2 C. & P. 591. (*h*) *Clarke v. Moore*, 1844, 1 Jo. & Lat. 723.

(*i*) *Delmege v. Mullins*, 1875, 1 R. 9 C. L. 209. As to variation in the statement of the amount in collateral instruments, see *Lainson v. Tremere*, 1834, 1 A. & E. 792.

though it seems that the increased rent can be recovered in an action for use and occupation (*j*).

An additional rent is frequently reserved in case the tenant violates the provisions of his lease; as, for instance, a yearly rent for every acre of land above a certain quantity which he ploughs up or converts into tillage (*k*). A sum thus reserved is not in general deemed a penalty, but a liquidated satisfaction fixed and agreed upon by the parties (*l*), and if it has once become payable it is payable as rent annually during the residue of the term (*m*), even though the land be restored to its original condition (*n*). The description of land in the lease as meadow does not estop the lessee from proving that it was in fact arable (*o*).

Increased
rent.

If the increased rent is expressly reserved payable yearly during the residue of the term after it has once become payable, the contract is construed as giving the lessee the right to do the act which attracts the additional rent (*p*), and the Courts have refused to restrain him from doing such act (*q*). But the question is one of construction as to the meaning of the contract (*r*); and it seems that where,

(*j*) *Burrowes v. Gradin*, 1843, 1 D. & L. 213.

(*k*) See *Fielden v. Tattersall*, 1863, 7 L. T. 718. As to additional rent in case of occupation by persons other than the lessee, see *Greenslade v. Tapscott*, 1834, 1 C. M. & R. 55; *Ponsonby v. Adams*, 1770, 2 Br. P. C. 431. As to using lands as a race-course under a provision of this nature, see *Aldridge v. Howard*, 1842, 4 M. & Gr. 921.

(*l*) *Rolfe v. Peterson*, 1772, 2 Bro. P. C. 436; *Farrant v. Olmius*, 1820, 3 B. & A. 692; *Smith v. Ryan*, 1844, 9 Ir. L. R. 235; *Wright v. Tracey*, 1873, 1 R. 7 C. L. 134; *Re E. of Mexborough and Wood*, 1882, 47 L. T. 516; *Lord Elphinstone v. Monkland Iron Co.*, 1886, 11 App. Cas. 332. See *Jones v. Green*, 1829, 3 Y. & J. 298; *Denton v. Richmond*, 1833, 1 Cr. & M. 734, 742; *Pollitt v. Forrest*, 1847, 11 Q. B. 949; *Bray v. Fogarty*, 1870, 1 R., 4 Eq. 544; *supra*, p. 159. For a case where an additional rent reserved "by way of penalty" for a breach of covenant in the last year of the term only was deemed to be a penalty, see *Willson v. Love*, 1896, 1 Q. B. 626.

(*m*) *Farrant v. Olmius*, *supra*; *Bowers v. Nixon*, 1848, 12 Q. B. p. 558.

(*n*) *Birch v. Stephenson*, 1811, 3 Taunt. p. 478. But see *Domville v. Ford*, 1872, 1r. R. 7 C. L. 534.

(*o*) *Skipworth v. Green*, 1725, 8 Mod. 311.

(*p*) *Legh v. Lillie*, 1860, 6 H. & N. 165; *infra*, p. 349.

(*q*) *Woodward v. Gyles*, 1690, 2 Vern. 119; *Rolfe v. Peterson*, 1772, 2 Bro. P. C. 436. See *French v. Macale*, 1842, 2 Dr. & W. p. 277; *Aylet v. Dodd*, 1741, 2 Atk. p. 239; *Benson v. Gibson*, 1746, 3 Atk. p. 396; *Hardy v. Martin*, 1783, 1 Cox, 26; *Jones v. Green*, 1829, 3 Y. & J. 298, 304; *Gerrard v. O'Reilly*, 1843, 3 Dr. & W. 414.

(*r*) *French v. Macale*, 1842, 2 Dr. & W. p. 276, 284.

in addition to the exaction of an increased rent or other sum on the doing of a specified act, the lessee is also made subject to forfeiture (s), or where a single payment only is reserved (t), the Court will restrain the lessee by injunction from doing the act. Where the lessee covenants to do a particular thing, as, in the lease of a public-house, to buy all beer used on the premises from the lessor, with a provision that he shall pay a reduced rent while this is done, he cannot pay the full rent and disregard the covenant (u).

Where there is a right of re-entry on breach of the covenant, it is at the option of the lessor whether he will re-enter or whether he will demand payment of the increased rent (x).

General rule
as to set-off
against rent.
i. On distress.

A tenant cannot, in general, set off against the rent sums due to him from his landlord, or payments made on behalf of his landlord, unless there is a special agreement to that effect (y), for although the sum due to the tenant may be of greater amount than the rent, yet if the rent is not paid the landlord may distrain for it (z). Hence a tenant cannot obtain an injunction against his landlord to restrain proceedings upon a replevin bond on the ground of a set-off against the rent distrained for (a).

ii. In action.

If, however, the landlord, instead of distraining, sues for rent, the defendant may plead a set-off (b). But in an action of covenant for rent the defendant cannot set off any *uncertain* damages that he may be entitled to

(s) *Barret v. Blugrave*, 1800, 5 Ves. 555; *French v. Macale*, 1842, 2 Dr. & W. p. 284. See *Weston v. Metrop. Asylum District*, 1882, 9 Q. B. D. 404.

(t) *City of London v. Pugh*, 1727, 4 Bro. P. C. 395, 397; *French v. Macale*, 2 Dr. & W. 269, 278. See *Jones v. Heuvels*, 1877, 4 C. D. 636.

(u) *Hambury v. Cundy*, 1887, 58 L. T. 155.

(x) *Weston v. Metrop. Asylum District*, 1882, 9 Q. B. D. 405; *Doe v. Jepson*, 1832, 3 B. & Ad. 402.

(y) See *Roper v. Bumford*, 1810, 3 Taunt. 76. If the landlord agrees to allow a specified sum laid out by the tenant in repairs, he can distrain for the whole rent, and the tenant must sue on his special agreement: *Graham v. Tate*, 1813, 1 M. & S. 609; unless he is authorized by the agreement to deduct from the rent: *Dallman v. King*, 1837, 4 Bing. N. C. 105.

(z) *Abolom v. Knight*, 1743, Bull. N. P. 181; Barnes, 450; *Laycock v. Tufnell*, 1787, 2 Chit. 531; judgment of Park, J., in *Andrew v. Hancock*, 1819, 1 Br. & B. at p. 46; *Willson v. Davenport*, 1833, 5 C. & P. 531.

(a) *Pratt v. Keith*, 1864, 33 L. J. Ch. 528. See *Townrow v. Benson*, 1818, 3 Madd. 203.

(b) R. S. C. 1883, Ord. 19, r. 3. See Roscoe's Evidence, 16th ed. 671.

recover against the landlord on any of the covenants in the lease (c).

The following payments may be deducted by the tenant from his rent :—Sums paid by the tenant for the landlord's share of property tax (d). Under the Income Tax Acts (e) the tenant may deduct the landlord's income tax, actually paid by the tenant (f), out of the next payment of rent ; and any contract for the payment of rent in full without allowing the deduction is void (g). Where, however, the rent is reserved clear of property tax, the lease is not altogether void, but the rent is payable subject to the deduction (h). And a covenant to pay the property tax will not avoid a separate covenant for payment of rent clear of taxes generally ; for these words will be understood of such taxes as the tenant may lawfully engage to defray (i). A proviso for reduction of rent in case of the repeal or suspension of the Income Tax Acts is good (k) ; and so is an agreement that if the tenant will pay the rent in full without any deduction in respect of the landlord's property tax, the landlord will repay to the tenant all sums paid for the tax (l). The tenant may deduct the tax, although the landlord is entitled to exemption (m) ; and, to justify deduction, it is sufficient to prove payment to the collector, without producing the assessment (n). If the landlord refuses to allow for property tax, and distrains for the full rent, the tenant may recover in an action for money had and received (o).

Deductions which may be made from rent.

1. Property tax.

(c) *Weigall v. Waters*, 1795, 6 T. R. 488. See *Gower v. Hunt*, 1735, Barnes, 290.

(d) See *Gabell v. Sherell*, 1813, 5 Taunt. 81 ; *Rex v. Mitchum*, 1783, 1 Doug. 226 n ; *Franklin v. Carter*, 1845, 1 C. B. 750.

(e) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60 ; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40 ; 27 & 28 Vict. c. 18, s. 15. As to houses let in several tenements, see Act of 1853, s. 36.

(f) Proviso to sect. 40 of Act of 1853.

(g) Act of 1842, ss. 73, 103. See *infra*, sect. 9 of this chapter, p. 363.

(h) *Fuller v. Abbot*, 1811, 4 Taunt. 105 ; *Tinckler v. Prentice*, 1812, 4 Taunt. 549.

(i) *Gaskell v. King*, 1809, 11 East, 165.

(k) *Colbron v. Travers*, 1862, 12 C. B. N. S. 181 ; *Beadel v. Pitt*, 1865, 11 L. T. 592.

(l) *Lamb v. Brewster*, 1879, 4 Q. B. D. 607.

(m) *Swatman v. Ambler*, 1855, 24 L. J. Ex. 185.

(n) *Philips v. Beer*, 1815, 4 Camp. 266.

(o) *Graham v. Tute*, 1813, 1 M. & S. 609.

When deduction to be made.

As soon as the tenant has paid the property tax, it is in effect a payment by him of so much of the next rent due to his landlord (*p*). But the deduction must be made from the next payment of rent, or the amount cannot afterwards be recovered (*q*). It is only on the production of a certificate of the tax being paid that the landlord is bound to make the allowance (*r*). A succeeding occupier may tender in part payment of his rent a receipt for property tax which has become due since the last payment of rent, and has been paid by the former occupier (*s*); and, if called upon to pay arrears which should have been paid by the former occupier, he may deduct these out of any subsequent payment of rent to the landlord (*t*).

2. Land tax.

Sums paid by the tenant for the landlord's proportion of the land tax (*u*)—that is, such proportion of the tax as the rent bears to the assessed annual value of the premises (*x*); provided there is no agreement to the contrary (*y*). A payment of land tax can only be deducted from the rent which has then accrued, or is then accruing due; for the law considers the payment of the land tax as a payment of so much of the rent then due, or growing due, to the landlord; and if afterwards the tenant pays the rent in full, he cannot at a subsequent time deduct the former land tax from the rent (*z*). An excessive deduction permitted, for several years, by mistake by the landlord or his agent, the landlord having the means of knowing all the facts, and there being no fraud or misrepresentation on the part of the tenant, will operate as a payment of so much rent, and the landlord cannot afterwards distrain for sums so deducted, or recover them by

(*p*) See per Abbott, J., in *Denby v. Moore*, 1817, 1 B. & A. at p. 129.

(*q*) *Denby v. Moore*, 1817, 1 B. & A. 123; *Cumming v. Bedborough*, 1846, 15 M. & W. 438.

(*r*) *Pocock v. Eustuce*, 1809, 2 Camp. 181; *Baker v. Davis*, 1814, 3 Camp. 474.

(*s*) *Glennel v. Read*, 1816, 7 Taunt. 50.

(*t*) Act of 1853, s. 35.

(*u*) 38 Geo. 3, c. 5, s. 17; *Hyde v. Hill*, 1789, 3 T. R. 377; *Ward v. Const*, 1830, 10 B. & C. 635, per Parke, J., p. 654.

(*x*) See judgment of Bayley, J., in *Stubbs v. Parsons*, 1820, 3 B. & A. 519; *Whitfield v. Brandwood*, 1818, 2 Stark. 440.

(*y*) 38 Geo. 3, c. 5, s. 35.

(*z*) Per Bayley, J., in *Stubbs v. Parsons*, 3 B. & A. at p. 520; *Andrew v. Hancock*, 1819, 1 Br. & B. 37; *Saunderson v. Hanson*, 1828, 3 C. & P. 314; *Spragg v. Hammond*, 1820, 2 Br. & B. 59.

action as arrears of rent (*a*). Where the lessee is bound to pay the land tax, and the tax is redeemed by a person beneficially entitled to the rent, the amount of the land tax is to be considered as rent reserved and may be recovered accordingly (*b*).

Sums paid by the tenant for the landlord's proportion of a sewers rate may be deducted in the absence of any agreement to the contrary (*c*); but the deduction must be made from the rent for the current year (*d*).

3. Sewers rate.

Rates imposed for local improvements are usually recoverable by the local authority from the occupier, who is authorized, in the absence of agreement, to deduct them from his rent. Thus drainage and paving expenses incurred by the local authority under the Metropolis Management Act, 1855 (*e*), may under the Metropolis Management Amendment Act, 1862 (*f*), be recovered either from the owner or the occupier, and in the latter case the owner must allow the occupier to deduct the rate from his rent; but this provision is without prejudice to any contract under which the occupier is bound to pay rates. The tenant cannot deduct, however, unless he has actually paid the rate (*g*).

4. Local improvement rates.

Similar provision is made with respect to expenses incurred in abating nuisances and private improvement expenses under the Public Health Act, 1875 (*h*). Thus where the occupier by whom any private improvement rate is paid holds the premises in respect of which the rate is made at a rent not less than the rack-rent (*i*), he is entitled

(*a*) *Bramston v. Robins*, 1826, 4 Bing. 11; *Waller v. Andrews*, 1838, 3 M. & W. 312.

(*b*) 42 Geo. 3, c. 116, s. 126. See *Ward v. Const*, 1830, 10 B. & C. 635; *Faulkner v. Llewellyn*, 1863, 9 L. T. 251, 557.

(*c*) The Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 38; *Smith v. Humble*, 1854, 15 C. B. 321. See *Tidswell v. Whitworth*, 1867, L. R. 2 C. P. p. 336.

(*d*) See *Andrew v. Hancock*, 1819, 1 Br. & B. 37; *Saunderson v. Hanson*, 1828, 3 C. & P. 314.

(*e*) 18 & 19 Vict. c. 120, ss. 73, 105.

(*f*) 25 & 26 Vict. c. 102, s. 96.

(*g*) *Ryan v. Thompson*, 1868, L. R. 3 C. P. 144.

(*h*) 38 & 39 Vict. c. 55; see sects. 104, 150, 214, 226. As to the levying of a local rate where a house is let in parts, see *Lobban v. Cooke*, 1858, 3 H. & N. 238.

(*i*) "Rack-rent" is defined by sect. 4 as rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises.

to deduct from his rent three-fourths of the amount paid by him on account of such rate; and if he holds at a rent less than a rack-rent he is entitled to deduct from his rent such proportion of three-fourths of the rate as his rent bears to the rack-rent (*k*).

5. Copyhold enfranchisement rent-charge.

An occupying tenant who properly pays on account of a rent-charge created on the enfranchisement of copyhold lands under the Copyhold Act, 1894 (*l*), any money which, as between himself and his landlord, that tenant is not liable to pay, is entitled to recover from the landlord the money paid, or to deduct it from the next rent payable by the tenant; and an intermediate landlord who pays or allows any sum under this provision may in like manner recover it from his superior landlord or deduct it from his rent (*m*).

6. Tithe rent-charge.

Formerly tithe rent-charge was recoverable from the occupier by distress, and the occupier who paid the rent-charge was, in the absence of agreement, entitled to deduct it from his rent (*n*)—that is, from the next payment of rent (*o*); though, inasmuch as there was no personal liability on the landlord to pay the rent, he was not bound to indemnify the tenant against the consequences of a distress (*p*). But by the Tithe Act, 1891 (*q*), the remedy by distress is abolished, and the tithe rent-charge is recoverable, where the land is in the occupation of a tenant, only by the appointment by the county court of a receiver of the rents (*r*). This method applies also to any sums directed by the earlier Tithe Acts or the Extraordinary Tithe Redemption Act, 1886 (*s*), to be recovered as tithe rent-charge (*t*), including redemption money (*u*).

The effect is that the tithe rent-charge is now payable

(*k*) 38 & 39 Vict. c. 55, s. 214. As to deduction by mesne lessees, see the latter part of the same section.

(*l*) 57 & 58 Vict. c. 46, ss. 8, 17.

(*m*) Sect. 27.

(*n*) The Tithe Act, 1836, 6 & 7 Will. 4, c. 71, s. 80; see sect. 70.

(*o*) *Dawes v. Thomas*, 1892, 1 Q. B. 414.

(*p*) *Griffenhoofe v. Daubuz*, 1855, 4 E. & B. 230; 5 E. & B. 746.

(*q*) 54 Vict. c. 8. See Tithe Rent-charge Recovery Rules, 1891.

(*r*) 54 Vict. c. 8, s. 2.

(*s*) 49 & 50 Vict. c. 54.

(*t*) 54 Vict. c. 8, s. 10 (4).

(*u*) *R. v. Paterson*, 1895, 1 Q. B. 31.

only by the owner (*x*), and any contract between the occupier and owner of lands, after the passing of the Act, for the payment of rent-charge by the occupier, is void (*y*). Where such a contract has been made before the Act, the occupier is not bound by it, but he is liable to pay to the owner such sum as the owner has properly paid on account of the tithe rent-charge which such occupier was liable under his contract to pay, exclusive of any costs incurred or paid by the owner in respect of such tithe rent-charge (*z*); and such sum is recoverable from the occupier by distress in like manner as is provided by 6 & 7 Will. 4, c. 71, ss. 81, 85, and the enactments amending those sections, and not otherwise (*a*). The position of the tenant is similar in respect of a tithe rent-charge created under the Extraordinary Tithe Redemption Act, 1886 (*b*). Such a rent-charge is only chargeable on land in respect of which at the date of the passing of the Act extraordinary tithe was payable (*c*). Rates imposed on tithe rent-charge are assessed on and recovered from the owner, and not on and from the occupier (*d*).

Where compensation from a landlord to his tenant, due under the Agricultural Holdings Act, 1883 (*e*), or under any custom or contract, has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord cannot distrain for more than the balance (*f*).

Compulsory payments made by an under-tenant of arrears of rent due from the original tenant to the original landlord, for which the goods of the under-tenant are liable to be distrained (*g*). A payment of such rent by the occupier,

7. Compensation under Agricultural Holdings Act.

8. Rent due to original landlord.

(*x*) That is, the person in receipt of rent from the occupier: *Peed v. King*, 1894, 11 T. L. R. 18.

(*y*) 54 Vict. c. 8, s. 1 (1).

(*z*) Sect. 1 (2). See *Hughes v. Rimmer*, 1893, 2 Q. B. 314.

(*a*) Sect. 1 (3). Although the tenant enters into an express agreement for payment of the sum in order to avoid a distress, such agreement is not enforceable: *Church v. Maxted*, 1898, 67 L. J. Q. B. 823.

(*b*) 49 & 50 Vict. c. 54, s. 7. See Tithe Act, 1891, ss. 9 (2), 10 (4).

(*c*) *Simmonds v. Heath*, 1894, 1 Q. B. 29.

(*d*) 54 Vict. c. 8, s. 6, repealing 6 & 7 Will. 4, c. 71, s. 70, and 1 Vict. c. 69, s. 8. As to arrears of rates due before the passing of the Tithe Act, 1891, see *Roberts v. Potts*, 1894, 1 Q. B. 213.

(*e*) 46 & 47 Vict. c. 61.

(*f*) Sect. 47.

(*g*) *Sapsford v. Fletcher*, 1792, 4 T. R. 511; *Carter v. Carter*, 1829,

in default of the original tenant, is not the less a compulsory payment, because the original landlord on demanding it allows the occupier time to pay (*h*). It has been said that the payment must have been preceded by a demand accompanied by a threat, in case of non-payment, to distrain, or to eject, or to "put the law in force" (*i*), but apparently the mere demand is sufficient (*k*).

Compulsory payments are held to be payments of the rent itself or part of it, and consequently may be pleaded by way of set-off, although as against a distress a general set-off is not allowed (*l*).

Rent growing due may be discharged by such payments as well as rent actually due (*h*).

Lodger.

If upon a distress being made upon goods of a lodger in the tenant's house, the lodger gives notice that the goods are his, the distress is not to be proceeded with; but the lodger may, on taking the steps required by the statute, pay to the landlord any rent due from him (*n*), and any such payment is to be deemed a valid payment on account of rent due to his immediate landlord (*o*).

9. Other compulsory payments.

If premises are liable to a distress, the tenant has a right to pay the charge to which they are liable, and to deduct from his rent the sum so paid (*p*). Payment by a tenant of an annuity or a legacy secured by power of distress (*q*), or of interest due on a mortgage made before the commencement of the tenancy (*r*), is considered as equivalent to payment of so much rent to the landlord. But in order to operate as a deduction from rent the money must have

5 Bing. 406; *Sturgess v. Farrington*, 1812, 4 Taunt. 614. See *O'Donoghue v. Coalbrook, &c. Co.*, 1872, 26 L. T. 806; *Wilkinson v. Carwood*, 1797, 3 Anst. 905; *Doe v. Hare*, 1833, 2 Cr. & M. 145.

(*h*) *Carter v. Carter*, 1829, 5 Bing. 406.

(*i*) *Whitmore v. Walker*, 1848, 2 C. & K. 615; *Taylor v. Zamira*, 1816, 6 Taunt. 524.

(*k*) See *Carter v. Carter*, 1829, 5 Bing. p. 409.

(*l*) *Graham v. Allsopp*, 1848, 3 Ex. 186, per Rolfe, B., at p. 198.

(*n*) Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), s. 1. *Infra*, p. 241.

(*o*) Sect. 3.

(*p*) Per Burrough, J., in *Taylor v. Zamira*, 1816, 6 Taunt. at p. 529.

(*q*) *Taylor v. Zamira*, 6 Taunt. 524; *Whitmore v. Walker*, 1848, 2 C. & K. 615.

(*r*) *Johnson v. Jones*, 1839, 9 A. & E. 809, 814; *Underhay v. Read*, 1887, 20 Q. B. D. 209; *Dyer v. Bowley*, 1824, 2 Bing. 94.

been actually paid (*s*); and the payment must be made either to relieve the tenant of an incumbrance on the land, or to discharge a debt due by the landlord (*t*).

If the demised premises are destroyed or rendered uninhabitable by fire, the full rent will nevertheless, in the absence of an express stipulation to the contrary (*u*), continue to be payable throughout the term granted by the lease (*v*), although the landlord refuses to rebuild, and even though he has received insurance money (*x*); and it is the same, though the lessee covenants to repair with an express exception of casualties by fire (*y*). Under these circumstances, an injunction will not be granted to restrain the landlord from suing for the rent (*z*). But where it appeared that the rent of furnished lodgings had been treated by the parties as compensation for occupation accruing from day to day, the rent stopped upon the lodgings becoming useless through fire (*a*).

Premises
destroyed by
fire, &c.

On the same principle, the tenant of a building is liable to pay rent after it has been carried away by a flood (*b*), or occupied by an alien enemy (*c*); and the tenant of land must also pay rent, though the land is covered with fresh water by an inundation, though not, it has been said, where it is invaded by the sea (*d*). And where there is a provision for suspension of rent in certain events, the lessee must pay the rent if the building is rendered useless by an event not specified (*e*).

(*s*) *Supra*, pp. 201—3. See *Ryan v. Thompson*, 1868, L. R. 3 C. P. 144.

(*t*) See judgment of Cresswell, J., in *Boodle v. Cumbell*, 1844, 7 M. & Gr. 386, at p. 397; *Graham v. Allsopp*, 1848, 3 Ex. 186.

(*u*) See *Bennett v. Ireland*, 1858, E. B. & E. 326.

(*v*) *Baker v. Holtzapffel*, 1811, 4 Taunt. 45; *Izon v. Gorton*, 1839, 5 Bing. N. C. 501; 7 Scott, 537; *Monk v. Cooper*, 1727, 2 Stra. 763; *Marshall v. Schofield & Co.*, 1882, 52 L. J. Q. B. 58. Rent will continue to be payable though the intended use of the premises is rendered illegal by statute: *Gibbons v. Chambers*, 1885, C. & E. 577.

(*c*) *Leeds v. Cheetham*, 1827, 1 Sim. 146; *Lofft v. Dennis*, 1859, 1 E. & E. 474.

(*y*) *Belfour v. Weston*, 1786, 1 T. R. 310; *Hare v. Groves*, 1796, 3 Anstr. 687.

(*z*) *Holtzapffel v. Baker*, 1811, 18 Ves. 115; *Leeds v. Cheetham*, 1827, 1 Sim. 146.

(*a*) *Packer v. Gibbins*, 1841, 1 Q. B. 241.

(*b*) *Curter v. Cummins*, 1665, cited in *Harrison v. North*, 1 Cas. in Ch. at p. 84.

(*c*) *Paradine v. Jane*, 1648, Aleyn, 26. See *Harrison v. North*, 1667, 1 Cas. in Ch. 83.

(*d*) 1 Roll. Abr. 236 (C.).

(*e*) *Saner v. Bilton*, 1878, 7 C. D. 815; *Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507. As to payment of rent by a lessee of tithes, where the tithes are commuted for a rent-charge, see *Tusker v. Bullman*, 1849, 3 Ex. 351.

Rent in
mining lease
where
minerals
exhausted.

So also a fixed or dead rent reserved in a mining lease will be payable throughout the term, although the mine demised should either originally (*f*), or in consequence of accident (*g*), not be worth the cost of working. And, in the absence of provision to the contrary in the lease, a dead rent will continue payable after all the minerals have been worked out by the lessee (*h*). But where the lease fixes a minimum amount of minerals to be raised, and does not specify a minimum rent, the lessee is not bound to pay royalty on the minimum amount if it does not exist in the land (*i*).

Premises unfit
for use or
habitation.

If a person contracts for the use and occupation of land for a specified time and at a specified rent, he is bound by his bargain, though the land may not answer the purpose for which he took it. If, for instance, the land should turn out to be wet, or the grass, from any reason, should prove to be deleterious to cattle, that would be no excuse for not paying the lessor his rent (*j*), nor would the fact that the land was originally of no value (*k*). So also, in the absence of fraud, the tenant is not exonerated from payment of rent though an *unfurnished* dwelling-house taken by him for immediate occupation is unfit for habitation (*l*).

Non-repair
by landlord.

It is no defence to an action for rent that the landlord is

(*f*) *Haywood v. Cope*, 1858, 25 Beav. 140; *Ridgway v. Sneyd*, 1854, Kay, 627, 635; *Jefferys v. Fairs*, 1876, 4 C. D. 448, 452; *Strelley v. Pearson*, 1880, 15 C. D. p. 119. Cf. *Gowan v. Christie*, 1873, L. R. 2 H. L. (Sc.) 273.

(*g*) *Phillips v. Jones*, 1839, 9 Sim. 519; *Mellers v. Devonshire*, 1852, 16 Beav. 252. In both these cases the lessees covenanted to pay "whether the coal should be got or not"; but in *Ridgway v. Sneyd*, Kay, p. 636, Wood, V.-C., said that a rent of a certain sum every year for the coal demised was equivalent to a rent whether the coal should be worked or not.

(*h*) *R. v. Bedworth*, 1807, 8 East, p. 388; *M. of Bute v. Thompson*, 1844, 13 M. & W. 487, 493; *Milne v. Taylor*, 1850, 16 L. T. O. S. 172; *Jerris v. Tomkinson*, 1856, 1 H. & N. 195.

(*i*) *Clifford v. Watts*, 1870, L. R. 5 C. P. pp. 587, 588; *infra*, p. 342. For the construction of special covenants relating to rents for coal, see *Edwards v. Rees*, 1836, 7 C. & P. 340; *Bishop v. Goodwin*, 1845, 14 M. & W. 260. Where royalty is payable on coal sold "at the pit's mouth": *Gerrard v. Clifton*, 1798, 7 T. R. 676; *Clifton v. Walmesley*, 1794, 5 T. R. 564; or on minerals brought "through, over or under" the demised premises: *G. W. Ry. Co. v. Rous*, 1870, L. R. 4 H. L. 650.

(*j*) Per Lord Abinger, C.B., in *Sutton v. Temple*, 1843, 12 M. & W. at p. 62.

(*k*) *Meath v. Cuthbert*, 1876, Ir. R. 10 C. L. 395.

(*l*) *Hart v. Windsor*, 1843, 12 M. & W. 68. As to a furnished house, see *infra*, sect. 4 (1), p. 332.

under an implied contract to repair the demised premises, and that by his neglect they have become useless to the tenant (*m*).

Rent is not recoverable for the period after the lessor has brought an ejectment for a forfeiture (*n*). Ejectment.

An eviction of the tenant by the landlord or by a person lawfully claiming under title paramount will constitute a defence to an action for rent or for use and occupation (*o*); but the defendant is bound to show that the eviction took place before the rent became due (*p*). An eviction of the tenant by the landlord from part of the demised premises operates as a suspension of the entire rent during the continuance of the eviction (*q*), and the landlord cannot sue the tenant for compensation for use and occupation in respect of any part of the premises of which the tenant retains possession (*r*). But the tenancy is not thereby put an end to, nor is the tenant discharged from the performance of his covenants other than the covenant for payment of rent (*s*), though during the eviction the landlord cannot insist on forfeiture for non-performance of covenants (*t*). Eviction.

To constitute an eviction of a tenant by his landlord which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord or by his authority, with the intention of depriving the tenant of the enjoyment of the premises as demised, or any part of them, will operate as an eviction (*u*). Whether such intention does or does What constitutes an eviction.

(*m*) *Surplice v. Farnsworth*, 1844, 7 M. & Gr. 576.

(*n*) *Jones v. Carter*, 1846, 15 M. & W. 718. See *Birch v. Wright*, 1786, 1 T. R. 378; *infra*, p. 467. The lessor will recover compensation for the detention of the premises as damages.

(*o*) *Tomlinson v. Day*, 1821, 2 Br. & B. 680; *Prentice v. Elliott*, 1839, 5 M. & W. 606.

(*p*) See *Boodle v. Cambell*, 1844, 7 M. & Gr. 386; *Selby v. Browne*, 1845, 7 Q. B. 620; *Newport v. Hardy*, 1845, 2 D. & L. 921. Cf. *Mountnoy v. Collier*, 1853, 1 E. & B. 630.

(*q*) *Morrison v. Chadwick*, 1849, 7 C. B. 266. See *Furnivall v. Grove*, 1860, 8 C. B. N. S. 496.

(*r*) *Upton v. Townend*, 1855, 17 C. B. 30. See *Reere v. Bird*, 1834, 1 C. M. & R. p. 36; *Hutchinson v. Taylor*, 1884, 77 L. T. Newsp. p. 120.

(*s*) *Morrison v. Chadwick*, *supra*; *Newton v. Allin*, 1841, 1 Q. B. 518.

(*t*) *Pellatt v. Boosey*, 1862, 31 L. J. C. P. 281.

(*u*) *Upton v. Townend*, 1855, 17 C. B. 30; notes to *Salmon v. Smith*, 1669, 1 Wms. Saund. 206. See *Baynton v. Morgan*, 1888, 22 Q. B. D. 74.

not exist is a question for a jury (*x*). But a mere trespass by the lessor does not constitute an eviction (*y*). Where the lessor gave notice to quit to the under-tenants, and part of the demised lands were in consequence left unoccupied, this was said to be an eviction of the lessee (*z*).

Reletting
by lessor.

Where a tenant from year to year quits at the end of the current year without notice, and before the expiration of the next half-year the landlord lets the premises to another tenant, who occupies them, such letting constitutes an eviction of the previous tenant (*a*), and the landlord is not entitled to recover rent from him for the period which elapsed from the time when he quitted the premises to the time when the landlord relet them (*b*), or for any subsequent period during which they may be unoccupied (*c*). The landlord who relets should give notice to the former tenant that he lets the premises solely on such tenant's account (*c*).

Entry by
lessor.

If while a tenant is in possession of premises the landlord enters and uses any part of them, he thereby deprives himself of his claim to rent (*d*).

So also if, after a tenant has left a house unoccupied, the landlord enters and is in profitable occupation of the house, he cannot recover rent from the tenant after such occupation; but this result will not be produced by merely putting a person into the house to take care of it and prevent depredations (*e*). The landlord of apartments deserted by the tenant may recover rent, although he has put up a bill in the window for the purpose of letting them (*f*), or has lighted fires in the rooms and made some use of such fires (*d*).

Eviction by
title para-
mount.

Similarly, where eviction by title paramount is set up as a defence to an action for rent, it appears that a constructive eviction is sufficient, and a constructive eviction takes

(*x*) *Upton v. Townend*, 1855, 17 C. B. 30; *Henderson v. Mears*, 1859, 7 W. R. 554. See *Wheeler v. Stevenson*, 1860, 6 H. & N. 155.

(*y*) *Newby v. Sharpe*, 1878, 8 C. D. 39, p. 51; *Hunt v. Cope*, 1775, Cowp. 242.

(*z*) *Burn v. Phelps*, 1815, 1 Stark. 94.

(*a*) Judgment of Holroyd, J., in *Hall v. Burgess*, 1826, 5 B. & C. at p. 333. (b) *Hall v. Burgess*, 1826, 5 B. & C. 332.

(*c*) *Walls v. Atcheson*, 1826, 3 Bing. 462.

(*d*) *Smith v. Raleigh*, 1814, 3 Camp. 513; *Griffith v. Hodges*, 1824, 1 C. & P. 419, 420.

(*e*) *Bird v. Defonvielle*, 1846, 2 C. & K. 415.

(*f*) *Redpath v. Roberts*, 1801, 3 Esp. 225.

place where a person entitled to the land threatens the tenant with eviction, and the tenant thereupon attorns to him (*g*). In the case, for example, of a lease made by a mortgagor in possession which, apart from the Conveyancing Act, 1881, is void as against the mortgagee, so that the mortgagee may eject the tenant and afterwards let to him, it has been said to be absurd to require the mortgagee to go through the form of ejectment (*h*). On the other hand, such a doctrine would lead to great danger of collusion (*i*), and it is not applicable where the tenant gives up possession voluntarily (*k*). The lessee who relies on this defence must show the evictor's title (*l*).

(7) APPORTIONMENT OF RENT.

As a general rule rent due under a lease will be apportioned upon a severance of the reversion, whether the severance takes place by the act of the parties or the act of law, rent-service in this respect differing from a rent-charge (*m*). Consequently it is apportionable where the lessor has granted (*n*) or devised (*o*) part of the reversion to the lessee or a stranger; where, in the case of a lease including both freehold and leasehold premises, upon the death of the lessor intestate the reversion in the demised premises is divided by operation of law between his real and personal representatives (*p*); or where the reversion descends to coparceners, and a partition is made between them (*o*).

In respect
of estate.

1. On grant or devise of part of reversion.
2. On severance of reversion on death of lessor intestate.

But the lessee is not bound by an apportionment of rent made upon the grant of part of the reversion, unless it is made either with his consent or by the verdict of a jury (*q*).

(*g*) *Mayor of Poole v. Whitt*, 1846, 15 M. & W. 571; *Carpenter v. Parker*, 1857, 3 C. B. N. S. pp. 234, 235; *Hill v. Saunders*, 1825, 4 B. & C. 529; *Newport v. Hardy*, 1845, 2 D. & L. 921.

(*h*) *Doe v. Barton*, 1840, 11 A. & E. p. 315.

(*i*) *Delaney v. Fox*, 1857, 2 C. B. N. S. p. 778. See *Dunn v. Di Nuoro*, 1841, 3 M. & Gr. 105.

(*k*) *Re Emery and Barnett*, 1858, 4 C. B. N. S. 423.

(*l*) *Mayor of Poole v. Whitt*, *supra*; *Jordan v. Twells*, 1736, Cas. temp. Hard. 171; *Simons v. Farren*, 1834, 1 Bing. N. C. 272. See *Foster v. Pierson*, 1792, 4 T. R. 617; *Hodgson v. East India Co.*, 1799, 8 T. R. 278.

(*m*) Litt. s. 222; Co. Litt. 148 a; *Collins and Harding's Case*, 1597, 13 Rep. 57. See Cruise, Dig. 303—306.

(*n*) Co. Litt. 148 a; *West v. Lassels*, 1601, Cro. Eliz. 851.

(*o*) See *Ewer v. Moyle*, 1600, Cro. Eliz. 771.

(*p*) *Moodie v. Garnance*, 1619, 3 Bulstr. 153.

(*q*) *Bliss v. Collins*, 1822, 5 B. & A. 876.

3. On tenant's losing possession of part of premises.

And the rent is equally apportionable where the lessee ceases to have possession of part of the demised premises, provided he is not wrongfully evicted. Thus it is apportioned where the lessee has surrendered part of the demised premises to the lessor (*r*), or has been lawfully evicted from part of the demised premises by a person having a title paramount to that of the lessor (*s*); or where the lessor has entered upon part of the demised premises upon a forfeiture under a special condition for re-entry into part (*t*). In case of eviction it lies upon the lessee to show the value of the land lost and the apportionment (*u*).

Where part of the demised land has been irretrievably lost from natural causes, as where it has been overflowed by the sea, the rent is apportionable, though not, it seems, where it has been covered with fresh water (*x*).

Failure to get possession.

In the case where the lessee cannot obtain possession of part of the demised premises the rent is not apportionable, but is either extinguished or is left intact according to circumstances. If the lease is by parol, no part of the rent is recoverable (*y*). And it is the same though the lease is under seal, if part of the demised premises are rightfully held under a title adverse to the lessor (*z*). If, however, the lease is under seal, and part of the lands are held under a prior lease from the lessor, the second lease operates as a lease in possession of the lands of which the lessor had possession, and as a lease of the reversion of the rest, and the whole rent is recoverable (*a*).

Personal liability not apportioned.

It seems that rent can be apportioned only where it is due in respect of a contract real or a contract based upon

(*r*) Co. Litt. 148 a; per Popham, J., in *Smith v. Malings*, 1608, Cro. Jac. 160.

(*s*) *Smith v. Malings*, 1608, Cro. Jac. 160. See *Stevenson v. Lambard*, 1802, 2 East, 575; *Doe v. Meylor*, 1814, 2 M. & S. 276; *Tomlinson v. Day*, 1821, 2 Br. & B. 680; *Hartley v. Mauldocks*, 1899, 47 W. R. 573; Co. Litt. 148 b.

(*t*) *Walker's Case*, 1587, 3 Rep. p. 22 b; *Collins and Harding's Case*, 1597, 13 Rep. p. 58.

(*u*) *Smith v. Malings*, 1608, Cro. Jac. 160.

(*x*) 1 Rol. Abr. 236 (C.); *supra*, p. 207.

(*y*) *Neale v. Mackenzie*, 1836, 1 M. & W. 747; 2 Cr. M. & R. 84. See *Watson v. Waud*, 1853, 8 Ex. 335, 339.

(*z*) *Holgate v. Kay*, 1844, 1 C. & K. 341.

(*a*) *Ecc. Comm. v. O'Connor*, 1858, 9 Ir. C. L. R. 242.

privity of estate (*b*). It can be apportioned, therefore, against a lessee in possession, and also against the assignee of the lessee. But the lessee after assignment is liable only on his personal contract, and, as this cannot be divided, it seems to be still law that he can be sued for the whole rent (*c*).

Where part of lands in lease are taken under the Lands Clauses Act, 1845 (*d*), the rent may be apportioned by agreement between the lessor and lessee on the one part and the promoters of the undertaking on the other part, and, failing agreement, as directed by the Act (*e*). Provision for apportionment of rent is also made by the Agricultural Holdings Act, 1883 (*f*), in the case of a tenant from year to year receiving notice under sect. 41 to quit part of a holding.

Lands Clauses Act, 1845.

Agricultural Holdings Act, 1883.

If a lease includes lands and goods, and the lessee is evicted from the land, the rent, which issues wholly out of the land, is gone, and there can be no apportionment (*g*).

Lease of land and goods.

At common law there was no apportionment of rent in respect of time (*h*), but this was permitted for certain cases by 11 Geo. 2, c. 19, and 4 & 5 Will. 4, c. 22 (*i*), and is now allowed generally under the Apportionment Act, 1870 (*k*), which provides as follows:—

Apportionment in respect of time.

Apportionment Act, 1870.

All rents (*l*) (whether reserved or made payable under an

Sect. 2.

(*b*) *West v. Lussels*, 1601, Cro. Eliz. 851. See *Walker's Case*, 1587, 3 Rep. 22 a.

(*c*) *Stevenson v. Lambard*, 1802, 2 East, 575; *Cruise*, Dig. III., 304. The opposite opinion of Pollock, B., in *Mayor of Swansea v. Thomas*, 1882, 10 Q. B. D. 48, is not supported by the judgment of the C. A. in *Baynton v. Morgan*, 1888, 22 Q. B. D. 74.

(*d*) 8 & 9 Vict. c. 18. As to apportionment in the case of land taken for any of the purposes of the Church Building Acts, see 17 & 18 Vict. c. 32, s. 1; and in the case of land taken for the purpose of sites for schools under 4 & 5 Vict. c. 38, and 7 & 8 Vict. c. 37, see 12 & 13 Vict. c. 94, s. 1.

(*e*) 8 & 9 Vict. c. 18, s. 119.

(*f*) 46 & 47 Vict. c. 61.

(*g*) *Emott v. Cole*, 1591, Cro. Eliz. 255. See *Read v. Lawrence*, 1562, Dy. 212 b. But where the land and goods devolve upon different persons, it seems that the rent will be apportioned: *Salmon v. Matthews*, 1841, 8 M. & W. 827; *supra*, p. 190.

(*h*) *Clun's Case*, 1614, 10 Rep. p. 128 a. See *Grimman v. Legge*, 1828, 8 B. & C. 324; *Slack v. Sharpe*, 1838, 8 A. & E. p. 373.

(*i*) The Apportionment Act, 1834. See also 6 & 7 Will. 4, c. 71; 14 & 15 Vict. c. 25; 23 & 24 Vict. c. 154; *Mills v. Trumper*, 1869, 4 Ch. 320; *Re M. of Anglesey's Estate*, 1874, 17 Eq. 283.

(*k*) 33 & 34 Vict. c. 35.

(*l*) Including rent-service, rent-charge, and rent-seck, and also tithes

instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Sect. 3.

Apportioned
part to be pay-
able at time
when entire
portion is
payable.

The apportioned part of any such rent shall be payable or recoverable in the case of a continuing rent when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent determined by re-entry, death or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Under sect. 4 persons entitled to apportioned parts of rent have the same remedies for recovering them when payable as they would have had in respect of the entire rent if entitled thereto respectively; but at the same time the lessee is not to be liable for any apportioned part specifically. The rent is recoverable by the heir or other person who would, but for the apportionment, be entitled to the entire rent, and he holds it subject to distribution.

The Act, which applies to all instruments whether coming into operation before or after its passing (*m*), does not alter the relation of landlord and tenant so as to make rent fall due before the day specified in the lease (*n*). But after the entire rent has fallen due it enables an apportionment to be made against a tenant who has held for only a part of the time. The Act affects not only the right to recover rent, but the liability to the payment of rent (*o*). Hence, where the trustee of a bankrupt lessee ceases to be liable on assigning the term, the lessor can recover against him a proportionate part of the rent up to the date of assignment (*p*). But a landlord who wrongfully evicts a tenant cannot recover an apportioned part of the rent (*q*).

and all periodical payments or renderings in lieu of or in the nature of rent or tithe: sect. 5. Apportionment under the Act can be excluded by express stipulation: sect. 7.

(*m*) *Re Cline's Estate*, 1874, 18 Eq. 213; *Lawrence v. Lawrence*, 1884, 26 C. D. 795.

(*n*) *Re United Club*, 1889, 60 L. T. 665. See *Re Lucas*, 1885, 55 L. J. Ch. 101. Where rent is payable in unequal portions, see *Ellis v. Rowbotham*, 1899, 80 L. T. 328.

(*o*) Per Vaughan Williams, J., in *Re Wilson*, 1893, 62 L. J. Q. B. p. 632.

(*p*) *Siransca Bank v. Thomas*, 1879, 4 Ex. D. 94. See report in 40 L. T. at p. 560. And see *Re Johnson*, 1894, 70 L. T. 381; *Hartcup & Co. v. Bell*, 1883, C. & E. 19; *Re South Kensington Co-operative Stores*, 1881, 17 C. D. 161.

(*q*) *Clapham v. Draper*, 1885, C. & E. 484.

(8) PAYMENT OF RENT.

Rent, whether the demise be by parol or under seal, is a debt of equal degree with a debt by specialty (*r*).

Rent a specialty debt.

A bill of exchange, or promissory note, given by a tenant to his landlord for rent in arrear, will not, until payment is actually made, operate as a satisfaction of the rent, or take away, or even postpone, the right of the landlord to distrain, or to avail himself of his other remedies for recovering the rent, unless there is an agreement to that effect (*s*); though the taking of a bill of exchange is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill (*t*). And it makes no difference that judgment has been obtained on the bill, if the judgment has not in fact produced satisfaction (*u*). But if a bill is given to the landlord's agent, and the agent discounts the bill, and pays the money to the landlord, this is a payment of the rent (*x*). An agreement by the landlord to accept interest on rent in arrear does not postpone the right of distress (*y*).

Bill or note.

Agreement to take interest.

If a landlord has either expressly or impliedly authorized his tenant to remit his rent by post, the money is remitted at the peril of the landlord (*z*); provided the tenant has used due caution in delivering the letter at a post office (*a*). Otherwise it is at the peril of the tenant (*z*).

Remittance by post.

An agent of the landlord who takes a cheque for the rent without authority to receive payment in that way may be liable to pay the full amount to the landlord if the cheque is dishonoured (*b*).

Payment by cheque.

(*r*) *Gage v. Acton*, 1700, 1 Salk. 325; *Vincent v. Godson*, 1854, 4 D. M. & G. p. 551; *Re Hastings*, 1877, 6 C. D. 610; *Kidd v. Boone*, 1871, 12 Eq. 89. As to the effect of a judgment for rent on the right to distrain, see *infra*, p. 217.

(*s*) *Davis v. Gyle*, 2 A. & E. 623; *Harris v. Shipway*, 1744, Bull. N. P. 182. See *Pulfrey v. Baker*, 1817, 3 Price, 572; *Davidson v. Allen*, 1886, 20 L. R. Ir. 16; *Talbot v. E. of Shrewsbury*, 1873, 16 Eq. 26.

(*t*) *Palmer v. Bramley*, 1895, 2 Q. B. 405.

(*u*) *Drake v. Mitchell*, 1803, 3 East, 251.

(*x*) *Parrott v. Anderson*, 1851, 7 Ex. 93.

(*y*) *Skerry v. Preston*, 1813, 2 Chit. 245.

(*z*) *Norman v. Ricketts*, 1886, 3 T. L. R. 182; *Luttges v. Sherwood*, 1895, 11 *ib.* 233; *Pennington v. Crossley & Sons, Lim.*, 1897, 13 *ib.* 513; *Warwicke v. Noakes*, 1791, Peake, N. P. C. 67.

(*a*) *Hawkins v. Rutt*, 1793, Peake, N. P. C. 186.

(*b*) *Papé v. Westmacott*, 1894, 1 Q. B. 272.

(9) EFFECT OF PAYMENT OF RENT.

As evidence of title.

Payment of rent raises a presumption that the party receiving it has a good title to the rent; but if made to a person from whom the tenant did not originally receive possession of the demised premises, the presumption may be rebutted (c). Hence a tenant who has come into possession under a former owner, and has paid, or agreed to pay, rent to a person who claims to be succeeding owner, in ignorance of a defect in the title of such person, may show that the claimant is not the landlord (d). Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired (e). Before the lessee can be bound by such payment as creating a new tenancy, the lessor must say openly, "My former title is at an end; will you, notwithstanding, go on?" (e).

Payment of rent by a tenant to an authorized agent, who does not disclose his principal's name at the time, but pays over the rent to his principal, is evidence as against the tenant of the principal's title (g).

(10) REMEDIES FOR RECOVERY OF RENT.

	PAGE
(i) <i>Distress</i>	217
(a) Requisites to	219
Certain and proper rent	219
Rent in arrear	222
Reversion in person distraining	222
Goods liable to distress	229
I. Goods absolutely privileged	230
II. Goods conditionally privileged	240
(b) Where distress must be made	243
Fraudulent removal	245
(c) When distress must be made	250
(d) Amount for which distress may be made	252

(c) Judgment of Gibbs, C.J., in *Rogers v. Pitcher*, 1815, 6 Taunt. at p. 208; *Cornish v. Searell*, 1828, 8 B. & C. 471; *Doe v. Clarke*, 1809, Peake, Add. Cas. 239; *Cox v. Knight*, 1856, 18 C. B. 645.

(d) *Gregory v. Doidge*, 1826, 3 Bing. 474, 475; *Claridge v. Mackenzie*, 1842, 4 M. & Gr. 143, 155. See *Brook v. Biggs*, 1836, 2 Bing. N. C. 572.

(e) *Fenner v. Duplock*, 1824, 2 Bing. 10, 11. See 3 Bing. 475.

(g) *Hitchings v. Thompson*, 1850, 5 Ex. 50.

	PAGE
(i) <i>Distress</i> —continued.	
(e) Mode of making	254
Employment of bailiff	254
Bailiff's indemnity	256
Demand of rent	257
Entry	257
Seizure	259
Excessive distress	260
Impounding	263
Abandonment of distress	268
Pound breach	268
(f) Requisites to sale under distress	269
Inventory and notice	270
Effect of tender	272
Appraisement	274
When now necessary	274
(g) Sale	276
(h) Costs of distress	281
(i) Remedies for illegal distresses	282
Rescue	283
Replevin	283
Action	288
Summary statutory remedies	289
(j) Remedy for irregular distresses	290
(ii) <i>Remedy on Execution against Tenant</i>	291
(iii) <i>Remedy on Bankruptcy of Tenant</i>	298
(iv) <i>Remedy on Winding-up</i>	302
(v) <i>Remedy by Action</i>	305
Statute of Limitations	307

Rent may be recovered by distress or by action. If the landlord distrains, the debt due from the tenant is suspended until the result of the distress is ascertained (*h*). Hence the landlord cannot sue for the rent so long as he continues to hold goods seized under a distress, notwithstanding that their value may be insufficient to satisfy the rent (*i*). If, on the other hand, he sues for rent in arrear and recovers judgment, the remedy by distress is extinguished, since the debt for rent is merged in the judgment (*h*).

(i) *Distress.*

As an incident to the relation of landlord and tenant, the landlord has at common law a power to distrain for arrears of rent upon all goods found upon the demised premises (*l*), whether the goods of the tenant or of a stranger (*m*),

Right of distress.

(*h*) See *Edwards v. Kelly*, 1817, 6 M. & S. p. 209; *Lehain v. Philpott*, 1875, L. R. 10 Ex. 242, p. 246.

(*i*) *Lehain v. Philpott*, *supra*.

(*k*) *Chancellor v. Webster*, 1893, 9 T. L. R. 568; *Potter v. Bradley*, 1894, 10 T. L. R. 445.

(*l*) The landlord may distrain notwithstanding that the lessee has been evicted by a stranger: *Humphry v. Davion*, 1613, Cro. Jac. 300.

(*m*) Hence, upon a sale of the tenant's goods by auction, the liability

except goods specially privileged from distress. An assignee of the reversion, *e.g.* a mortgagee, is not barred from distraining by a parol agreement between the tenant and the assignor of which the assignee has no notice (*n*). But the landlord must, in general (*o*), exercise his right while the goods are upon the premises, and he is not protected by the appointment of a receiver (*p*).

Goods of a stranger.

The landlord cannot distrain upon goods of a stranger when they have been brought upon the premises by the landlord himself without the owner's authority (*q*) ; or upon goods received by the tenant in the course of his business if he has been authorized to carry on the business in his landlord's name (*r*). A distress upon the goods of a stranger in operation at the time of the tenant's bankruptcy prevents them from being in the order and disposition of the bankrupt (*s*). A stranger whose goods are seized is entitled to redeem them and to be reimbursed by the lessee the money paid to redeem them, or, if they are sold, he can recover the value from the lessee (*t*) ; and after an assignment he can recover against the original lessee, notwithstanding that when the goods were placed on the premises he knew of the assignment (*u*).

Suspension of right of distress.

Where the lessee contracts to purchase the reversion, the lease is not thereby determined, but the landlord's right to distress is in equity suspended pending completion, provided the contract continues and is enforceable by an action for specific performance. If, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the lessor may distrain (*x*).

to distress passes with the goods, and the auctioneer is not justified in paying the rent out of the proceeds of sale in order to avert a threatened distress : *Sweeting v. Turner*, 1872, L. R. 7 Q. B. 310.

(*n*) *Carter v. Salmon*, 1880, 43 L. T. 490. (*o*) *Infra*, p. 244.

(*p*) See *Re Sutton*, 1863, 32 L. J. Ch. 437 ; *Re Suffield and Watts*, 1888, 20 Q. B. D. 693.

(*q*) *Paton v. Carter*, 1883, C. & E. 183.

(*r*) *Miles v. Furber*, 1873, L. R. 8 Q. B. 77, 82.

(*s*) *Sacker v. Chidley*, 1865, 13 W. R. 690.

(*t*) *Edmunds v. Wallingford*, 1885, 14 Q. B. D. 811, p. 814.

(*u*) *Exall v. Partridge*, 1799, 8 T. R. 308 ; though held otherwise in *England v. Marsden*, 1866, L. R. 1 C. P. 529, where the stranger placed the goods on the premises solely for his own benefit.

(*x*) *Ellis v. Wright*, 1897, 76 L. T. 522.

An express agreement by the landlord to postpone his right of distress is valid and binding on him (*y*). Hence, if a lessee agrees not to distrain on an underlessee unless the lessee shall have previously paid the rent due from himself to the superior landlord, and shall produce to the underlessee the receipt for such rent, the lessee cannot distrain until he has fulfilled these conditions (*y*).

Postponement of right of distress.

Equity will relieve against distress in a case where it is fraudulent on the part of the landlord to insist on this remedy (*z*); and if the landlord's right to the rent is in dispute, an injunction against distraining may be granted, though the Court will probably only do this on terms of the amount of the rent being brought into court (*a*).

Relief against distress.

(a) REQUISITES TO DISTRESS.

Unless a distress is made under the terms of a special power (*b*), the following circumstances must exist to enable the landlord to avail himself of that remedy:—(1) There must be a certain and proper rent; (2) the rent must be in arrear; (3) there must be a reversion in the person distraining; (4) there must be goods on the demised premises liable to be distrained.

A Certain and Proper Rent.

The rent for which the distress is made must be rent properly so called—that is to say, rent due in respect of an actual tenancy of corporeal hereditaments (*c*).

Existing demise.

Hence there is no distress for rent due under a mere licence (*d*), and formerly there was no distress for rent due under an agreement for a lease, even though possession

(*y*) *Giles v. Spencer*, 1857, 3 C. B. N. S. 244. *Infra*, p. 252.

(*z*) *Fowkes v. Joyce*, 1689, 2 Vern. 129. See *Horsford v. Webster*, 1835, 1 Cr. M. & R. 696.

(*a*) Judic. Act, 1873, s. 25, sub-sect. (8): *Shaw v. E. of Jersey*, 1879, 4 C. P. D. 359. See *Sanxter v. Foster*, 1841, Cr. & Ph. 302.

(*b*) *Infra*, p. 221.

(*c*) *Supra*, pp. 189-191. As to an acknowledgment of an antecedent tenancy showing authority to distrain, see per Alderson, B., in *Eagleton v. Gutteridge*, 1843, 12 L. J. Ex. p. 361; *Gladman v. Plummer*, 1845, 15 L. J. Q. B. 79; and as to distress by a vendor to whom the purchaser has become tenant to secure the carrying out of the agreement, see *Yeoman v. Ellison*, 1867, L. R. 2 C. P. 681.

(*d*) *Ward v. Day*, 1863, 4 B. & S. p. 358; *Rendell v. Roman*, 1893, 9 T. L. R. 192.

Or agreement
capable of
specific per-
formance.

had been taken, unless a tenancy had been created by payment of rent or otherwise (*e*). To obviate the difficulty a special power of distress till the execution of the lease was sometimes inserted (*f*). But now the agreement, if capable of specific performance, is equivalent to a lease (*g*), and, if possession has been taken, the rent can be distrained for though no legal tenancy has been created. It is no objection to the power of distress that the tenancy on which the rent is reserved is a tenancy at will (*h*).

The landlord cannot distrain after he has treated the occupier as a trespasser (*i*), or after a notice to quit has become effectual. And a distress cannot be made on a tenant holding over as tenant at sufferance unless a new tenancy can be implied (*k*). For any subsequent occupation the landlord's remedy is by an action for use and occupation (*l*). If the lessor's title has expired, he cannot enforce the continuance of the tenancy by distress, if the tenant refuses to recognize him as landlord, even though the tenant has already paid rent under a threat of distress (*m*); and, *a fortiori*, where the tenant has been evicted by title paramount, and has retaken the premises from the evictor (*n*).

Rent must be
ascertained or
ascertainable.

Moreover, before the landlord takes into his hand the speedy remedy of distress, he must see that the amount of rent to be demanded has been settled with precision (*o*). He has no right to distrain, unless a fixed rent has been expressly or impliedly (*p*) agreed upon (*q*); if there is no

(*e*) *Hegun v. Johnson*, 1809, 2 Taunt. 148.

(*f*) *Bicknell v. Hood*, 1839, 5 M. & W. 104. See *Anderson v. Midland Ry. Co.* 1861, 3 E. & E. 614.

(*g*) *Walsh v. Lonsdale*, 1882, 21 Ch. D. 9. See *supra*, p. 81.

(*h*) See *Morton v. Woods*, 1868, 37 L. J. Q. B., per Blackburn, J., p. 247.

(*i*) *Bridges v. Smyth*, 1829, 5 Bing. 410.

(*k*) *Jeuner v. Clegg*, 1832, 1 Moo. & R. 213, 218; *Williams v. Stiven*, 1846, 9 Q. B. 14.

(*l*) *Alford v. Fickery*, 1842, Car. & M. 280.

(*m*) *Burne v. Richardson*, 1813, 4 Taunt. 720.

(*n*) *Hopcraft v. Keys*, 1833, 9 Bing. 613.

(*o*) Per Tindal, C.J., in *Regnart v. Porter*, 1831, 7 Bing. at p. 454.

(*p*) See *Knight v. Bennett*, 1826, 3 Bing. 361.

(*q*) *Watson v. Waud*, 1853, 8 Ex. 335. See *Anderson v. Midland Ry. Co.*, 1861, 3 E. & E. 614.

fixed rent, the law gives him a remedy by the action for use and occupation (*r*). A rent which, though of fluctuating amount, is ascertainable with certainty, may be distrained for (*s*); as, for instance, a rent of so much per cubic yard for marl got, and so much per thousand for bricks made (*t*). A distress may be made for an increased rent of so much per acre for every acre of land converted into tillage (*u*); or for a monthly rent due under an attornment clause in a building society mortgage, consisting of the monthly amount of subscriptions, interest, and fines (*x*). And a rent for a portion of a room in a factory, with steam power, is not rendered uncertain by reason of a provision for deductions in respect of a possible failure in the supply of steam power (*y*). Where rent is apportionable, the apportioned part may be distrained for (*z*).

By express agreement, however, a power may be conferred to distrain for payments which are not rent (*a*). Thus, a sum payable by way of punishment for not spending the produce on the land demised may be made recoverable by distress to be made in the same way as a distress for rent in arrear (*a*). And such a power does not depend upon a legal tenancy. Thus, apart from the Bills of Sale Acts, a person, whether he is tenant or not, can give a power of distress over goods of his own, as, for instance, to secure interest for money lent (*b*), or the price of goods supplied (*c*). But in the absence of a tenancy such a power of distress is rendered impracticable by the Bills of Sale Acts, 1878 and 1882 (*d*). A power of distress not

Express power
of distress.

(*r*) See judgment of Abbott, C.J., in *Dunk v. Hunter*, 1822, 5 B. & A. at p. 325. Double value cannot be recovered by distress, *infra*, Chap. VII., sect. 5 (2), p. 514.

(*s*) Co. Litt. 96 a.

(*t*) *Daniel v. Gracie*, 1844, 6 Q. B. 145; *Selby v. Greaves*, 1868, L. R. 3 C. P. pp. 602, 603.

(*u*) See *Roulston v. Clarke*, 1795, 2 H. Bl. 563; *supra*, p. 199.

(*x*) *Ex parte Voisey*, 1882, 21 C. D. 442.

(*y*) *Selby v. Greaves*, 1868, L. R. 3 C. P. 594.

(*z*) *Neale v. Mackenzie*, 1836, 1 M. & W. 758.

(*a*) *Pollitt v. Forrest*, 1847, 11 Q. B. 949.

(*b*) *Chapman v. Beecham*, 1842, 3 Q. B. 723.

(*c*) *Iredale v. Kendall*, 1878, 40 L. T. 362.

(*d*) *Pulbrook v. Ashby*, 1887, 56 L. J. Q. B. 376; *Stevens v. Marston*, 1890, 60 L. J. Q. B. 192. As to attornment clauses in mortgage deeds, see *supra*, p. 83.

incident to a tenancy does not authorize distress against the goods of a stranger (*e*).

Rent in Arrear.

Rent in
arrear.

There can be no distress till the rent is in arrear, and rent is not in arrear until the day appointed for payment has elapsed (*f*) ; hence, no distress can be made until the day after the rent-day (*f*). Where by custom or express reservation rent is payable in advance (*g*), the landlord may distrain for it as soon as the half-year, or other period for which it is to be paid, has begun (*h*).

Notice before
distress.

Ordinarily notice is not necessary before the distress is made (*i*). But it is otherwise in the case of a penal rent, or where the date of payment of rent is accelerated by the landlord. In the case of a penal rent, a tenant, not knowing whether his landlord will insist on the penal rent or no, is not bound to be ready to pay before notice (*k*). And where rent is payable quarterly, or half-quarterly if required, the landlord cannot, after receiving the rent quarterly, distrain without notice at the half-quarter (*l*). Where rent is payable in advance, *if required*, a demand for payment must be made before the landlord can distrain (*m*) ; but the demand may be made after the day on which the rent thereby becomes due (*n*). If the landlord's rights are in peril, he may distrain immediately after demand (*o*).

Reversion in Person Distraining.

Reversion
necessary.

In general the person who distrains, or on whose behalf the distress is made, must possess a reversion (*p*) ; hence

(*e*) *Gibbs v. Cruikshank*, 1873, 28 L. T. 104.

(*f*) *Dibble v. Bowater*, 1853, 2 E. & B. 564, 568. See 2 Wms. Saund. 288.

(*g*) *Supra*, pp. 146, 192.

(*h*) *Buckley v. Taylor*, 1788, 2 T. R. 600 ; *Harrison v. Barry*, 1819, 7 Price, 690, 698 ; *Lee v. Smith*, 1854, 9 Ex. 662, 665 ; *Wulsh v. Lonsdale*, 1882, 21 C. D. 9.

(*i*) *Gillingham v. Gwyer*, 1867, 16 L. T. 640.

(*k*) Per Alderson, J., in *Mallam v. Arden*, 1833, 10 Bing. p. 300.

(*l*) *Mallam v. Arden*, *supra* ; see *Cloices v. Hughes*, 1870, L. R. 5 Ex. 160.

(*m*) *Clarke v. Holford*, 1848, 2 C. & K. 540 ; *Williams v. Holmes*, 1853, 8 Ex. 861, p. 863.

(*n*) *Witty v. Williams*, 1864, 12 W. R. 755 ; *supra*, p. 192.

(*o*) *London & Westm. Loan, &c. Co. v. L. & N. W. Ry. Co.*, 1893, 2 Q. B. 49.

(*p*) See cases cited *supra*, in notes (*k*), (*l*), (*m*), p. 191 ; and *Pascoe v. Pascoe*, 1837, 3 Bin g. N. C. 898. Cf. *Hazeldine v. Heaton*, 1883, C. & E. 40.

the lessor cannot distrain after he has assigned his reversion for arrears of rent due before the assignment. It follows that a mortgagee who has assigned his mortgage cannot distrain for interest reserved by way of rent due before the assignment (*q*). On the other hand, a parol assignment, since it is inoperative to pass the reversion, confers no power of distress on the assignee (*r*). By granting a lease to commence at the expiration of an existing lease, the lessor does not part with the reversion so as to disentitle him to distrain (*s*).

Since distress depends upon the existence of a reversion, rent reserved on the assignment of a lease cannot be distrained for (*t*).

The remedy of a lessee, who surrenders his lease in order to be renewed, by distress for rent due from his underlessee remains the same as if the original lease had been kept on foot (*u*); but the remedy of the chief landlord, by distress upon the premises comprised in the underlease, for the rent reserved in the new headlease is restricted to the amount of rent reserved by the original headlease out of which such underlease was derived (*u*).

Surrender of
mesne lease.

In other cases of surrender, or in case of merger, of the reversion expectant on a lease, the owner of the next vested estate is to be deemed the reversioner expectant on the lease for the purpose of distress (*x*).

Under sect. 5 of the Mercantile Law Amendment Act, 1856 (*y*), a surety who pays a debt for the principal debtor is entitled to all the remedies of the creditor; but the term "remedies" applies only to proceedings in court, and a surety for the payment of rent is not entitled to distrain (*z*).

Surety for
rent.

But the reversion, to support a distress, need not be an actual reversion; it is sufficient if it be a reversion by estoppel (*a*), and if one party is let into possession by the

Reversion by
estoppel.

(*q*) *Brown v. Metrop. Counties, &c. Society*, 1859, 1 E. & E. 832.

(*r*) *Brawley v. Wade*, 1824, M'Clel. 664.

(*s*) *Smith v. Day*, 1837, 2 M. & W. 684.

(*t*) *Supra*, p. 191.

(*u*) The Landlord and Tenant Act. 1730, 4 Geo. 2, c. 28, s. 6; *infra*, p. 461.

(*x*) The Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 9, *infra*, p. 461.

(*y*) 19 & 20 Vict. c. 97.

(*z*) *Re Russell*, 1885, 29 C. D. 254.

(*a*) See *supra*, p. 74.

other under an agreement that the one shall be tenant and the other landlord, as between themselves each party is estopped from denying the other's title (*b*). Hence, if a mortgagor, who has executed a second mortgage, has attorned to the second mortgagee, and occupied as tenant to him, a distress for rent due under the tenancy created by such attornment may (apart from any question arising under the Bills of Sale Acts (*c*)) be made by such mortgagee, although he has no legal reversion, and although it appears on the face of the deed that he has no such reversion (*d*). It makes no difference that the mortgagor has previously attorned to the first mortgagee, and that the first mortgage is still on foot (*e*).

Distress for
rent under
lease before
mortgage.

Distress by
mortgagor.

In the case of a lease made before the mortgage, the mortgagor's title to distrain ceases on the assignment of the reversion by the mortgage deed; but if permitted by the mortgagee to continue in the receipt of such rent, he is during such permission, *præsumptione juris*, authorized, if it should become necessary, to realize the rent by distress; and though the mortgagor may have to justify the distress as bailiff for the mortgagee, it is not necessary that the distress should be made in the mortgagee's name (*f*).

Distress by
mortgagee.

The mortgagee as assignee of the reversion has the same rights under the lease as the mortgagor had before the mortgage, and, after he has given notice of the mortgage to the lessee, he may distrain for rent in arrear at the time of the notice, and rent subsequently becoming due (*g*). And this result is not prevented by a change in the tenancy made by the mortgagor after the mortgage, whereby the rent is increased, though probably the mortgagee could only distrain for the original rent, his remedy for the increased rent being by an action for use and occupation (*h*).

Distress for
rent under
lease after
mortgage.

The right of distress under a lease made by a mortgagor in possession after the date of the mortgage depends on

(*b*) Judgment of Blackburn, J., in *Morton v. Woods*, 1868, 37 L. J. Q. B. at p. 248.

(*c*) *Supra*, p. 83.

(*d*) *Morton v. Woods*, 1868, L. R. 3 Q. B. 658; aff. L. R. 4 Q. B. 293.

(*e*) *Ex parte Punnett*, 1880, 16 C. D. 226.

(*f*) *Reece v. Strousberg*, 1885, 54 L. T. 133; *Trent v. Hunt*, 1853, 9 Ex. 14; *Snell v. Finch*, 1863, 13 C. B. N. S. 651. See per Erle, C.J., pp. 656, 657.

(*g*) *Moss v. Gallimore*, 1779, 1 Dougl. 279; *Rogers v. Humphreys*, 1835, 4 A. & E. 299. (*h*) *Burrows v. Gradin*, 1843, 1 D. & L. 213.

whether the mortgage is subject to sect. 18 of the Conveyancing Act, 1881 (*i*), or not. In mortgages not subject to the section, the mortgagor may distrain in virtue of his reversion by estoppel (*k*); but he must bear in mind that compulsory payments previously made by his tenant to the mortgagee for interest due on the mortgage are equivalent to payment of so much rent (*l*). The mortgagee cannot distrain for rent due under a lease made by the mortgagor after the mortgage until a new tenancy has been expressly or impliedly created between the mortgagee and the tenant (*m*). Notice by the mortgagee to the tenant to pay the rent to him does not constitute a tenancy between the parties, so as to enable the mortgagee to distrain for rent accruing due after the notice (*n*).

Not under Conveyancing Act, 1881, s. 18.

In the case of a mortgage which is subject to sect. 18 of the Conveyancing Act, 1881, the mortgagor is entitled to distrain so long as the mortgagee does not interfere; but his right ceases when the mortgagee either appoints a receiver (*o*) or gives notice to the tenant to pay the rent to himself. In the latter case the mortgagee may distrain as owner of the reversion (*o*). It is, therefore, unnecessary for any fresh tenancy to be created.

Under Conveyancing Act, 1881, s. 18.

A receiver appointed by mortgagor and mortgagee to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite, and to whom the mortgagor has attorned as tenant, may distrain on the goods belonging to the mortgagor on the mortgaged premises (*p*). A mere authority to tenants to pay rent to a person, whose receipt is to be their discharge, may perhaps authorize that person to demand, but not to distrain for the rent (*q*).

Receiver.

A receiver appointed by the mortgagee under the Conveyancing Act, 1881, has power to recover the rents of the

Receiver under Conveyancing Act, 1881.

(*i*) 44 & 45 Vict. c. 41.

(*k*) *Alchorne v. Gomme*, 1824, 2 Bing. 54.

(*l*) *Supra*, p. 206.

(*m*) *Evens v. Elliott*, 1838, 9 A. & E. 342; *Rogers v. Humphreys*, 1835, 4 A. & E. 299; *supra*, p. 196.

(*n*) *Bayly v. Went*, 1884, 51 L. T. 764.

(*o*) C. A. 1881, sect. 10; *Municipal Building Society v. Smith*, 1888, 22 Q. B. D. 70.

(*p*) *Jolly v. Arbuthnot*, 1859, 4 De G. & J. 224.

(*q*) *Ward v. Shew*, 1833, 9 Bing. 608.

property by distress, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of (*r*).

Receiver
appointed by
the court.

Where a lease is taken from a receiver appointed by the Court (*s*), or where the tenant has attorned to such receiver (*t*), the receiver can distrain in his own name. But the attornment to the receiver does not enure for the benefit of the person ultimately found to be entitled to the legal estate (*u*). Where the receiver is not in the position of landlord, he must distrain in the name of the person who is legally entitled to the rent (*v*), and if there is any doubt as to who this person is, he may properly apply to the Court for an order to distrain, though ordinarily he can distrain without special order (*x*), at any rate if there is not more than a year's rent in arrear (*y*).

Recovery of
arrears due
at death of
reversioner.

3 & 4 Will. 4,
c. 42, s. 37.

Executors,
&c. of landlord
may distrain
for rent due
in his life.

Sect. 38.

Arrears may
be distrained
for within six
months after
end of lease.

Upon the death of the reversioner it was at common law impossible to recover arrears of rent by distress, but by statute the executors or administrators of any lessor or landlord may distrain upon lands demised for any term (*z*), or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime (*a*).

Such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided that such distress be made within

(*r*) Sect. 24 (3).

(*s*) *Dancer v. Hastings*, 1826, 4 Bing. 2.

(*t*) *Hughes v. Hughes*, 1790, 1 Ves. 161.

(*u*) *Evans v. Mathias*, 1857, 7 E. & B. 590.

(*v*) See *Re Powers*, 1890, 63 L. T. 626.

(*x*) Per Lord Hardwicke in *Pitt v. Snorden*, 1752, 3 Atk. 750; *Bennett v. Robins*, 1832, 5 C. & P. 379; *Brandon v. Brandon*, 1821, 5 Madd. 473. See Kerr on Receivers, 3rd ed. pp. 160—2.

(*y*) See Fisher on Mortgages, 5th ed. 408. As to distress in the case of Crown leases, see 10 Geo. 4, c. 50, s. 90.

(*z*) As to the recovery of rents created for a freehold estate, see 32 Hen. 8, c. 37, s. 1; *Prescott v. Boucher*, 1832, 3 B. & Ad. 849; *Jones v. Jones*, 1832, *ib.* 967; *Appleton v. Doily*, 1609, Yelv. 135; Co. Litt. 162 b; 1 Williams on Exors. 9th ed. 799.

(*a*) By 11 Geo. 2, c. 19, s. 15, the executors or administrators of a tenant for life can by action recover against the under-tenants a part, apportioned to the death of the tenant for life, of the rent reserved on a lease determining on such death. See 14 & 15 Vict. c. 25, s. 1, *infra*, p. 498.

the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due.

An executor, before probate, may distrain for rent due to the testator (*b*).

The real estate of a deceased person now vests upon his death in his personal representatives (*c*), and, while it remains so vested, they have power to distrain for rent accruing due. Upon an intestacy it is possible that the legal estate vests in the heir-at-law pending the grant of administration so as to entitle him to distrain, but the point is doubtful (*c*).

Real representative.

Since by virtue of the Married Women's Property Act, 1882 (*c*), a married woman is capable of acquiring and holding any real or personal property as her separate property in the same manner as if she were a *feme sole* (*f*), a married woman who was married since 31st December, 1882, may distrain in her own name for rent in arrear under a lease the reversion on which belongs to her (*g*); and a married woman who has married before 1st January, 1883, may distrain in her own name for rent in arrear under a lease of property her title to which has accrued after that date and the reversion upon which belongs to her (*h*). But the Act does not interfere with settlements (*i*), and hence, in the case of property settled either before or after the marriage, the powers of the married woman will depend on the terms of the settlement. If she takes a legal estate in the reversion, she will have power to distrain; otherwise not.

Married woman.

With regard to freehold and copyhold property acquired before 31st December, 1882, by a woman married before that date, the husband may distrain for arrears of rent accruing during the life of the wife on leases of such property; and he may also distrain for arrears of rent due on subleases of leasehold property of the wife (*k*).

Distress by husband.

(*b*) *Whitehead v. Taylor*, 1839, 10 A. & E. 210; 1 Williams on Exors., 9th ed. 250.

(*c*) *Supra*, p. 62.

(*e*) 45 & 46 Vict. c. 75.

(*f*) Sect. 1 (1).

(*g*) Sect. 2.

(*h*) Sect. 5.

(*i*) Sect. 19.

(*k*) Bullen on Distress (2nd ed.), p. 57.

If the husband is tenant by the curtesy, he may in virtue of that estate distrain for rent accruing due after the termination of the coverture. If he does not become tenant by the curtesy, his interest ceases on the death of his wife (*l*), and on principle he cannot distrain for future arrears; but it has been said that a man who has made a lease for years reserving rent of lands of which he is seised in right of his wife, although on her death he does not become tenant by the curtesy, but his estate is determined, may nevertheless distrain for the rent until her heir has entered (*m*). The husband, if he takes out administration, can distrain for arrears of rent under 3 & 4 Will. 4, c. 42, s. 37, as administrator to his wife.

Tenant from
year to year.

A tenant from year to year, underletting from year to year, has a sufficient reversion to support a distress (*n*).

Joint tenants.

One of several joint tenants or coparceners may distrain for the whole rent without any express authority from the rest (*o*); but he must justify in his own right and as bailiff to the rest (*o*).

It is incident to this species of property that a severance of the reversion destroys the right to distrain for arrears of a single rent then due. Hence, if joint tenants have demised at a single rent, and a severance takes place by a conveyance of the shares of some of the joint tenants, no distress can be made for arrears of such rent due before the severance (*p*). But a surviving joint tenant may distrain for arrears of rent accrued due before the death of his co-tenant (*q*).

Tenants in
common.

Tenants in common are entitled to separate distresses for their several shares of the rent reserved upon a lease granted by all of them (*r*). It has been said that they may

(*l*) *Blake v. Foster*, 1800, 8 T. R. 487; judgment of Bayley, J., in *Hill v. Saunders*, 1825, 4 B. & C. at p. 535. See *Howe v. Scarrott*, 1859, 4 H. & N. 723.

(*m*) Bac. Abr. (C. 1) 650; *Dixon v. Harrison*, 1670, Vaugh. 46.

(*n*) *Curtis v. Wheeler*, 1830, Moo. & M. 493. See *Oxley v. James*, 1844, 13 M. & W. 209, p. 214.

(*o*) *Pullen v. Palmer*, 1697, 3 Salk. 207; *Leigh v. Shepherd*, 1821, 2 Br. & B. 465; *Robinson v. Hofman*, 1828, 4 Bing. 562. See *Stedman v. Bates*, 1696, 1 Salk. 390.

(*p*) *Staveley v. Allcock*, 1851, 16 Q. B. 636.

(*q*) 2 Rol. Abr. 86.

(*r*) *Whitley v. Roberts*, 1825, McClel. & Y. 107.

all join in one distress (*s*), but under the former practice they had to avow separately (*s*). As in the case of joint tenants (*t*), one tenant in common may distrain upon another who holds by lease under him (*u*), and the distress may be taken on any part of the land (*v*). But rent due from one co-owner to another cannot be got by distress on the goods of a third co-owner, or on those of a stranger placed on the land by the permission of a co-owner (*x*).

One coparcener may, before partition, distrain alone for the whole rent without any express authority from her sister (*y*), but she must justify in her own right and also as bailiff to her sister (*z*). The same rules apply to co-heirs in gavelkind, who are coparceners by custom (*z*). Coparceners.

When land is vested in churchwardens and overseers under 59 Geo. 3, c. 12, s. 17, it is competent for any one churchwarden or overseer to make a distress or order one to be made without calling a meeting of all and having the authority of a majority of those present (*a*). Church-wardens.

A tenant of a rent-service by elegit is entitled to distrain, and that without any attornment by the lessee (*b*). Attornment is not necessary where the reversion is assigned by operation of law (*c*). Tenant by elegit.

Goods Liable to be Distrained.

Under the power of distress incident to the relation of landlord and tenant the landlord may, generally speaking, distrain for rent all movable chattels which are upon the demised premises (*d*) at the time when the distress is made. Whether such goods are the property of the tenant or of General rule at common law.

(*s*) Bullen on Distress, 50 ; Litt. s. 317 ; *Harrison v. Barnby*, 1793, 5 T. R. 246 ; *Pullen v. Palmer*, 1697, 3 Salk. 207.

(*t*) *Supra*, p. 63.

(*u*) *Brennan v. Flood*, 1854, 4 Ir. C. L. R. 332.

(*v*) *Snellgar v. Henston*, 1621, Cro. Jac. 611.

(*x*) *Kempe v. Cory*, 1691, 2 Vent. 227, 283. See Vincr's Abridg. "Distress," I. 25—27 ; *Re Potter*, 1874, 18 Eq. 381.

(*y*) *Leigh v. Shepherd*, 1821, 2 Br. & B. 465, 470.

(*z*) *Stedman v. Bates*, 1695, 1 Ld. Raym. 64 ; *Page v. Stedman*, 1695, Carth. 364. See *Decharmes v. Horwood*, 1834, 10 Bing. p. 529.

(*a*) *Gouldsworth v. Knights*, 1843, 11 M. & W. 337, p. 342.

(*b*) Bullen on Distress, 70.

(*c*) *Lloyd v. Davies*, 1848, 2 Ex. 103.

(*d*) For cases where chattels may be distrained off the demised premises, see *infra*, p. 244.

a stranger is perfectly immaterial, provided they are on the premises, and are not privileged from distress (*e*). But as no authority can be given by an express power of distress granted by the tenant alone to seize the goods of third persons, a landlord who distrains under such an express power must restrict his seizure to the tenant's own goods (*f*).

Exemptions
from distress.

Certain classes of goods, however, are privileged from distress, and such privilege may be either absolute or conditional. In the latter case the goods are only privileged in the event of there being other goods on the premises sufficient to answer the distress.

I. GOODS ABSOLUTELY PRIVILEGED.

1. Fixtures.

Things annexed to the freehold cannot be distrained (*g*), because they cannot be taken away without doing damage to the freehold (*h*), and also because they cannot be restored in their original plight (*i*). The latter reason is founded upon the circumstance that goods distrained were formerly merely taken by way of pledge and could not be sold. Things annexed to the freehold include tenant's fixtures, such as kitchen ranges, stoves, coppers, grates, &c. (*k*); also trees growing in a nurseryman's grounds (*l*).

The temporary removal of fixtures out of their proper place, for repairs, does not deprive them of this privilege (*m*).

Keys and
title-deeds.

Keys and title-deeds are by construction of law part of the freehold, and cannot be distrained (*n*).

2. Goods sent to the tenant in the way of trade.

Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of

(*e*) Per Buller, J., in *Gorton v. Falkner*, 1792, 4 T. R. at p. 568. See *Muspratt v. Gregory*, 1838, 1 M. & W. 633; 3 M. & W. 677; *Cramer v. Mott*, 1870, L. R. 5 Q. B. 357. (*f*) *Supra*, p. 222.

(*g*) Co. Litt. 47 b; *Gorton v. Falkner*, 1792, 4 T. R. at p. 569.

(*h*) *Simpson v. Hartopp*, 1745, Willes, 512; 1 Sm. L. C. 10th ed. 421.

(*i*) *Darby v. Harris*, 1841, 1 Q. B., per Patteson, J., p. 898. See *Pitt v. Shew*, 1821, 4 B. & A. 206.

(*k*) *Darby v. Harris*, 1841, 1 Q. B. 895. And as to fixtures, see *infra*, Chap. VII.; *Hellawell v. Eastwood*, 1851, 6 Ex. 295; *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328.

(*l*) *Clark v. Gaskarth*, 1819, 8 Taunt. 431; *Clark v. Culvert*, 1819, 3 Moo. 96.

(*m*) See judgment in *Gorton v. Falkner*, 1792, 4 T. R. at p. 567.

(*n*) See *Hellawell v. Eastwood*, 1851, 6 Ex. at pp. 306, 311; *Liford's Case*, 1615, 11 Rep. 50 b.

his trade or employ. These are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are (*o*). The word "public" in this connection refers to every trade or employ carried on *generally* for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals. The trade need not be public in the sense that all the Queen's subjects have a right to insist on the trader accepting their goods (*p*). But an artist to whom a picture is delivered to alter does not "manage" it as a public trader (*q*).

Under this head are included corn sent to a miller to be ground (*r*) ; a horse sent to a farrier's to be shod (*s*) ; materials sent to a manufacturer to be worked up (*t*), including the case of material delivered to a weaver to be manufactured at his own home (*u*) ; beasts sent to a butcher to be slaughtered (*x*) ; goods deposited for the purpose of sale with a factor (*y*), commission agent (*z*) or auctioneer (*a*) ; or placed for safe custody in the warehouse of a wharfinger (*b*) ; or pledged with a pawnbroker (*c*) ; also the goods of guests brought into an inn (though not horses placed in a stable which is let by the tenant of the stable to an inn-keeper (*d*)), and goods delivered to a carrier to be conveyed

(*o*) *Simpson v. Hartopp*, 1745, Willes, 512. See judgment of Erle, C.J., in *Swire v. Leach*, 1865, 34 L. J. C. P. at p. 151 ; *Gisbourn v. Hurst*, 1710, 1 Salk. 249.

(*p*) *Muspratt v. Gregory*, 1836, 1 M. & W., per Parke, B., at p. 653. See *Gibson v. Ireson*, 1842, 3 Q. B. pp. 44, 46 ; *Tapling v. Weston*, 1883, C. & E. 99.

(*q*) *Von Knapp v. Moss*, 1891, 7 T. L. R. 500.

(*r*) Co. Litt. 47 a.

(*s*) Year Book, 22 Ed. 4, fol. 49 b.

(*t*) *Gibson v. Ireson*, 1842, 3 Q. B. 39 ; *Read v. Burley*, 1597, Cro. Eliz. 549.

(*u*) *Wood v. Clarke*, 1831, 1 Cr. & J. 484.

(*x*) *Brown v. Shevill*, 1834, 2 A. & E. 138.

(*y*) *Gilman v. Elton*, 1821, 3 Br. & B. 75 ; *Mathias v. Mesnard*, 1826, 2 C. & P. 353.

(*z*) *Findon v. McLaren*, 1845, 6 Q. B. 891.

(*a*) *Adams v. Crane*, 1833, 1 Cr. & M. 380.

(*b*) *Thompson v. Mashiter*, 1823, 1 Bing. 283.

(*c*) *Swire v. Leach*, 1865, 18 C. B. N. S. 479.

(*d*) *Crosier v. Tonkinson*, 1759, 2 Ld. Ken. 439. See argument in *Francis v. Wygott*, 1764, 3 Burr. p. 1500 ; and *cf. Forckes v. Joyce*, 1689, 3 Lev. 260 ; 2 Vern. 129.

by him to some place, whether he is strictly a common carrier or no, provided he carries the goods of all persons indifferently (*e*).

Factors and
auctioneers.

In the case of a factor, it makes no difference whether the goods are deposited in his own warehouse or, if he has not got one, in the warehouse of another (*f*). Goods delivered to an auctioneer, it has been held, are privileged if they are in a yard attached to the auctioneer's premises (*g*), and even away from his premises entirely, as in a place of sale hired by the auctioneer for the occasion (*h*) or taken by an act of trespass (*i*). Perhaps the latter case goes too far, and at any rate the auctioneer must be in occupation of the place where he sells; there is no privilege for the goods of the tenant sold by the auctioneer on the tenant's premises, or for goods sent to such a sale by a stranger (*k*).

On the other hand, goods placed in the hands of the tenant, merely with the intent that they shall remain on the premises, are not privileged from distress (*l*). Hence, brewers' casks sent to a public-house, and left with the publican till they are empty, may be distrained by the owner of the public-house (*m*). Where salt works were let on lease, and a boat belonging to a purchaser of salt was left in the custody of the lessees in a canal on the premises, to wait for a load of salt, it was held that it was not delivered to the lessees in the way of their trade and was not privileged (*n*).

Wine sent to
warehouse.

It was held in *Ex parte Russell* (*o*) that wine sent to the warehouse of a wine-warehouseman to be matured, is liable to be distrained for rent due to the landlord of the premises where it is deposited, though not wine sent to be bottled and to be returned by a specified day. But it would

(*e*) *Gisbourn v. Hurst*, 1710, 1 Salk. 249.

(*f*) *Mathias v. Mesnard*, 1826, 2 C. & P. 353.

(*g*) *Williams v. Holmes*, 1853, 8 Ex. 861.

(*h*) See *Adams v. Grane*, 1833, 1 Cr. & M. 380.

(*i*) *Brown v. Arundell*, 1850, 10 C. B. 54.

(*k*) *Lyons v. Elliott*, 1876, 1 Q. B. D. 210; though in such a case the possession of the goods is in the auctioneer: *Williams v. Millington*, 1788, 1 H. Bl. 81. See *Davis v. Artingstall*, 1880, 49 L. J. Ch. 609.

(*l*) See judgment of Wilde, B., in *Parsons v. Gingell*, 1847, 4 C. B. at p. 558.

(*m*) *Joule v. Jackson*, 1841, 7 M. & W. 450.

(*n*) *Muspratt v. Gregory*, 1836, 1 M. & W. 633; 3 *ib.* 677.

(*o*) 1870, 18 W. R. 753.

seem that, if it was the business of the warehouseman to take in wine to be warehoused, the former part of the decision was wrong. In the similar case of furniture sent to a depository, the privilege exists (*p*). The law of distress by which one man's goods are made liable for another's debts is not one which should be carried beyond the limits to which it has already been confined (*q*). So the decision that carriages and horses standing at livery may be distrained by the landlord for rent due by the livery stable-keeper (*r*) would probably now be followed, if at all, with reluctance.

For goods to be privileged under this head they must be actually delivered to the tenant by or on behalf of the person for whom they are to be manufactured or otherwise dealt with. Hence a ship built by a shipbuilder to the order of a purchaser, the materials being procured by the shipbuilder, is not privileged, notwithstanding that the purchaser has duly paid the instalments of purchase-money (*s*).

The necessities of commerce account also for the protection of cattle in (*t*) or going to a fair or market (*u*). If the distance is great enough to require a night's rest, they cannot be distrained by the landlord of a field into which they are put to graze for the night (*u*).

Nothing may be distrained for rent which cannot be rendered again in as good plight as it was in at the time when the distress was taken (*x*). The exemption applies to perishable goods, such as milk or meat; and to things which cannot be recovered, as loose money (*y*). But money in a sealed bag may be distrained (*z*).

The privilege depends on delivery by owner of goods.

Cattle in or on the way to market.

3. Things which cannot be restored.

(*p*) *Miles v. Furber*, 1873, L. R. 8 Q. B. 77.

(*q*) Per Archibald, J., in *Miles v. Furber*, at p. 83.

(*r*) *Francis v. Wylatt*, 1764, 1 W. Bl. 483; 3 Burr. 1498; *Parsons v. Gingell*, 1847, 4 C. B. 545.

(*s*) *Clarke v. Millwall Dock Co.*, 1886, 17 Q. B. D. 494.

(*t*) Co. Litt. 47 a.

(*u*) *Tate v. Glead*, 1784, 2 Wms. Saund. ed. 1871, 675, note (*x*); *Nugent v. Kirwan*, 1838, 1 Jebb & Sy. 97; *Muspratt v. Gregory*, 1836, 1 M. & W., per Alderson, B., p. 647; *Lyons v. Elliott*, 1876, 1 Q. B. D. p. 214. The contrary decision in *Fowkes v. Joyce*, 1689, 3 Lev. 260, is not now law. See 2 Vern. 129.

(*x*) Co. Litt. 47 a; *Darby v. Harris*, 1841, 1 Q. B. p. 898, per Denman, C.J.

(*y*) *Morley v. Pincomb*, 1848, 2 Ex. 101.

(*z*) Bac. Abr. "Distress" (B.), p. 697.

Growing corn
and corn in
sheaves, &c.

Distress now
permitted by
statute.

Upon the same principle, growing corn and corn in sheaves were formerly privileged from distress (*a*); but these exemptions have been abolished by statute. By 11 Geo. 2, c. 19, s. 8, it is made lawful for every landlord, or his steward, bailiff, receiver, or other person empowered by him, to seize all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, growing on any part of the estates demised, as a distress for arrears of rent (*b*). And by 2 Will. & M. sess. 1, c. 5, s. 2, it is lawful for any person having rent arrear, and due upon any demise, to seize and secure any sheaves or cocks of corn, or corn loose, or in the straw (*c*), or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent (*d*).

The former statute does not extend to trees and shrubs growing in a nurseryman's ground, but is confined to products of a similar nature to those specified in the section—that is, to produce which ripens and which has to be cut, gathered, made and laid up when ripe (*e*).

4. Things in
actual use.

Things in actual use are privileged on the ground of the breach of the peace which might result from an attempt to distrain them (*f*). Thus the exemption applies to a horse, while it is drawing a cart (*g*) or being ridden (*h*); tools, while a man is working with them (*f*); and, it seems, wearing apparel, while in actual use. But clothes not being worn may be distrained (*k*). Such actual use must be

(*a*) Co. Litt. 47 a; *Wilson v. Duckett*, 1676, 2 Mod. 61; *Simpson v. Hartopp*, 1745, Willes, 512.

(*b*) See *infra*, p. 266, as to the impounding of these crops. As to the effect with respect to growing crops of a power to distrain for arrears of an annuity charged on land in the same manner as a lessor can distrain for rent, see *Miller v. Green*, 1831, 2 Tyr. 1.

(*c*) Whether threshed or not: *Belasyse v. Burbridge*, 1695, 1 Lutw. 213.

(*d*) See *infra*, p. 265. This section applies to a power of distress for a rent seek under 4 Geo. 2, c. 28, s. 5; *Johnson v. Faulkner*, 1842, 2 Q. B. 925.

(*e*) *Clark v. Gaskarth*, 1819, 8 Taunt. 431; *Clark v. Calvert*, 1819, 3 Moo. 96.

(*f*) *Simpson v. Hartopp*, *supra*.

(*g*) *Field v. Adams*, 1840, 12 A. & E. 649.

(*h*) *Storey v. Robinson*, 1795, 6 T. R. 138; Co. Litt. 47 a; *Read v. Burley*, 1597, Cro. Eliz. 594.

(*k*) *Baynes v. Smith*, 1794, 1 Esp. 203; *Bisset v. Caldwell*, 1791, *id.* note; Peake, N. P. C. 36.

shown as to make it appear probable that a distress would have led to a breach of the peace (*l*).

Animals *feræ nature* and other things in which there is no valuable property cannot be distrained (*m*). Under this head dogs have been said to be included (*m*), but, if such was ever the law, it has long been altered (*o*). Deer in an inclosed park may be distrained (*o*), and so, it seems, may tame deer in any inclosed ground, though it may not be strictly a park (*q*).

5. Wild animals.

Goods which have been distrained *damage feasant*, or are in the possession of the sheriff under an execution (*r*). And although a purchaser from the sheriff is ordinarily bound to remove the goods at once, if he wishes to avoid liability to distress (*s*); yet, if they are not capable of immediate removal, the goods in his hands are protected until they can properly be removed. In other words, goods are deemed to be still in the custody of the law until they are ready for removal, and the purchaser from the sheriff has had a reasonable time to remove them (*t*). Thus, in the case of growing crops, the crops were, prior to 14 & 15 Vict. c. 25, s. 2 (*u*), protected until they were ripe and the purchaser had had time to cut them and either carry them away or consume them (*x*). The circumstance that the purchaser of the crops had not entered into an agreement with the sheriff under 56 Geo. 3, c. 50, s. 3 (*y*), did not justify a distress by the landlord (*z*).

6. Things in the custody of the law.

(*l*) *Bunch v. Kensington*, 1841, 1 Q. B. 679.

(*m*) Co. Litt. 47 a.

(*o*) See *Davies v. Powell*, 1738, Willes, 46.

(*q*) *Ib.*; and see *Morgan v. E. of Abergareenny*, 1849, 8 C. B. 768; *Ford v. Tynte*, 1862, 31 L. J. Ch. 177.

(*r*) Co. Litt. 47 a; *Eaton v. Southby*, 1738, Willes, 131; *Wharton v. Naylor*, 1848, 12 Q. B. 673. As to the means to be adopted by the landlord, where his tenant's goods are taken in execution, see *infra*, p. 291. If the proceedings in respect of which the execution is levied are annulled, money received by the sheriff's officer as the proceeds of a distress levied by him belongs to the landlord: *St. John's Coll. v. Marcott*, 1797, 7 T. R. 259.

(*s*) *Re Benn Davis*, 1885, 55 L. J. Q. B. 217.

(*t*) *Wharton v. Naylor*, 1848, 12 Q. B. 673.

(*u*) *Infra*, p. 237.

(*v*) *Peacock v. Purris*, 1820, 2 Br. & B. 362; *Hutt v. Morrell*, 1848, 11 Q. B., per Parke, B., p. 441; *Wright v. Dewes*, 1834, 1 A. & E. 641.

(*y*) *Infra*, p. 351.

(*z*) *Wright v. Dewes, supra*.

Receiver.

Goods in the possession of a receiver appointed by the Court may be distrained, but the leave of the Court should be obtained (*a*).

Sheriff must remain in possession.

To prevent distress it is necessary for the sheriff to continue in possession of the goods (*b*), and if the goods remain on the premises after a fictitious bill of sale under an execution they are liable to distress as before (*c*). Whether the sheriff by withdrawing from the premises has abandoned possession is a question of fact, and, it seems, he will be held to have abandoned possession if his withdrawal is for the convenience of the debtor (*d*). So if after an interpleader order the sheriff, with the consent of the execution creditor and claimant, temporarily withdraws from possession, the goods are no longer in the custody of the law, and the landlord is entitled to distrain, though he knows that interpleader proceedings are pending (*e*). And similarly the right of distress is revived if the execution is waived (*f*).

Produce sold by sheriff subject to agreement to consume it on the land.

Under the Sale of Farming Stock Act, 1816, s. 1 (*g*), the sheriff is prohibited in certain cases from selling produce for the purpose of being carried off the land; but the purchaser, being thus bound to keep the produce on the land, is at the same time protected against distress:—

56 Geo. 3.
c. 50, s. 6.

Where any purchaser of any crops or produce hereinbefore mentioned (*g*) shall have entered into any agreement with such sheriff or other officer, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for rent on any corn, hay, straw, or other produce thereof, which, at the time of such sale and the execution of such agreement, entered into under the provisions of this Act, shall have been severed from the soil and sold, subject to such agreement, by such sheriff or other officer; nor on any turnips, whether drawn or growing (*i*), if sold according to

Landlord not to distrain on produce so sold.

(*a*) *Re Sutton*, 1863, 32 L. J. Ch. 437; though in *Walsh v. Walsh*, 1839, 1 Ir. Eq. R. 209, it was held that such leave was not necessary. And see *Re Till*, 1873, 16 Eq. 97; *Engel v. S. Metrop. Brewing Co.*, W. N. 1891, p. 31. (*b*) *Blades v. Arncliffe*, 1813, 1 M. & S. 711.

(*c*) *Smith v. Russell*, 1811, 3 Taunt. 400.

(*d*) *Bagshawes (Lim.) v. Deacon*, 1898, 2 Q. B. 173.

(*e*) *Cropper v. Warner*, 1883, C. & E. 152.

(*f*) *Seven v. Mihill*, 1756, 1 Ld. Ken. 370.

(*g*) See *infra*, p. 350.

(*i*) But see 14 & 15 Vict. c. 25, s. 2, *infra*, p. 237.

the provisions of this Act ; nor on any horses, sheep or other cattle, nor on any beast whatsoever, nor on any waggons, carts, or other implements of husbandry, which any person shall employ, keep or use on such lands, for the purpose of threshing out, carrying or consuming any such corn, hay, straw, turnips or other produce, under the provisions of the Act, and the agreement or agreements directed to be entered into between the sheriff or other officer and the purchaser of such crops and produce.

But growing crops sold under an execution are, in the absence of sufficient distress of the goods of the tenant, liable to distress for rent accruing after the sale. Thus it is provided by the Landlord and Tenant Act, 1851, that in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of execution, such crops, so long as the same shall remain on the farm or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent ; and that notwithstanding any bargain, sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer.

An extent against a Crown debtor, although tested after a seizure has been made under a distress for rent, but before sale under the distress, will have priority (*k*).

In certain cases cattle straying on to the demised premises are exempt from distress. Where a stranger's cattle escape into the tenant's land by breaking fences in which there is no defect, or by breaking defective fences if the liability to repair them is not upon the owner or occupier, the cattle may be immediately distrained for rent, even before they are *levant* and *couchant*. But if the cattle come on the premises through defect of fences which the owner or occupier ought to repair, they cannot be distrained by the landlord for rent, though they are *levant* and *couchant*, unless the owner of the cattle, after notice that they are on the land, neglects or refuses to drive them

Growing crops.

14 & 15 Vict. c. 25, s. 2.

Growing crops seized and sold under execution to be conditionally liable to distress for rent accruing after seizure and sale.

Execution against Crown debtor.

7. Straying cattle.

(*k*) *R. v. Cotton*, 1741, Parker, 112 ; *R. v. Southerby*, 1716, Bunbury, 5.

away (*l*). The owner of the land should in such a case either repair the fences or put the tenant under covenant to do so. If he does not, and the fences are defective, he cannot take advantage of his own default and distrain.

8. Hired agricultural machinery and breeding stock.

Agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant of a holding to which the Agricultural Holdings Act, 1883 (*m*), applies, and is on the premises of such tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business; and live stock of all kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, may not be distrained for rent in arrear (*n*).

9. Frames, materials, &c. entrusted to workmen.

By 6 & 7 Vict. c. 40 (*nn*), s. 18, no frame, loom or machine, materials, tools or apparatus entrusted for the purpose of being used or worked in the woollen, worsted, linen, cotton, flax, mohair or silk manufactures (*o*), or any work connected therewith, or any parts or processes thereof, whether such frame, &c., shall or shall not be rented or taken by the hire, may be distrained for rent, unless the rent be due by the owner of the said frame, &c., or of any part thereof.

Not to be distrained except for rent due by owner.

Sect. 19.
Remedy of owner of frame, &c.

If any landlord distrains any frame, &c., belonging to any other person which has been entrusted for the purpose of being used in any of the said manufactures, and refuses to restore possession of all such frames, &c., to the person entrusting the same, when demanded by him, any two or more justices of the peace may order the property to be forthwith restored.

10. Wearing apparel, bedding, and tools to value of 5*l*.

The Law of Distress Amendment Act, 1888 (*p*), exempts from distress any goods or chattels of the tenant or his family which would be protected from seizure in execution under sect. 96 of the County Courts Act, 1846, or any

(*l*) Notes to *Poole v. Longuerille*, 1669, 2 Saund. 290, n. (7); Co. Litt. 47 b, note (301); Bullen on Distress, 121; 3 Black. Comm. 8. See *Goodwin v. Cheveley*, 1859, 4 H. & N. 631; *Kempe v. Crews*, 1697, 1 Ld. Raym. 167.

(*m*) 46 & 47 Vict. c. 61.

(*n*) Sect. 45.

(*nn*) The Hosiery Act, 1843.

(*o*) See sects. 1, 2.

(*p*) 51 & 52 Vict. c. 21, s. 4. As to the remedy upon a distress in violation of this provision, see *infra*, p. 289.

enactment amending or substituted for the same; *i.e.* the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade to the value of 5*l.* (*q*). But the enactment does not extend to any case where the lease, term or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and the distress is not made within seven days of the demand.

Other exemptions have been created as follows:—As to meters and pipes, the property of a waterworks company, which are used for the supply of water to a house, by the Waterworks Clauses Acts, 1847 (*r*), s. 44, and 1863 (*s*), s. 14; as to gas meters and fittings, by the Gasworks Clauses Act, 1871 (*t*), s. 18; as to electric lighting apparatus by the Electric Lighting Act, 1882 (*u*), s. 25; and as to railway rolling stock by the Railway Rolling Stock Protection Act, 1872 (*x*).

11. Further statutory exemptions.

All processes whereby the goods or chattels of any ambassador or other public minister of any foreign prince or state (*y*), authorised and received as such by the Crown, or of the domestic or domestic servant (*z*) of any such ambassador or other public minister, may be distrained, are null and void to all intents and purposes whatsoever (*a*).

12. Goods of ambassador.

(*q*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 147, replacing sect. 96 of the Act of 1846. As to sewing machine, see *Churchward v. Johnson*, 1889, 54 J. P. 326.

(*r*) 10 & 11 Vict. c. 17.

(*s*) 26 & 27 Vict. c. 93.

(*t*) 34 & 35 Vict. c. 41. The corresponding provision of the Act of 1847, sect. 14, is repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), except so far as it is incorporated with special Acts to which 34 & 35 Vict. c. 41, does not apply. A gas stove is within the exemption: *Gaslight and Coke Co. v. Hardy*, 1886, 17 Q. B. D. 619.

(*u*) 45 & 46 Vict. c. 56.

(*x*) 35 & 36 Vict. c. 50: *Easton Estate Co. v. Western Waggon Co.*, 1886, 54 L. T. 735.

(*y*) The privilege extends to a British subject accredited to Great Britain by a foreign government as a member of its embassy: *Macartney v. Garbutt*, 1890, 24 Q. B. D. 368.

(*z*) This includes secretaries: *Triquet v. Bath*, 1764, 3 Burr. 1478; and servants who are natives of this country: *Lockwood v. Coysgarne*, 1765, 3 Burr. 1676. But the service must be *bonâ fide*: *Lockwood v. Coysgarne*; *Triquet v. Bath*; see *Re Cloete*, 1891, 65 L. T. 102. And the privilege only covers goods upon premises occupied for the purposes of the embassy: *Novello v. Toogood*, 1823, 1 B. & C. 554.

(*a*) 7 Aune, c. 12, s. 3.

II. GOODS CONDITIONALLY PRIVILEGED FROM DISTRESS.

The following kinds of property cannot be distrained if there are sufficient goods of other kinds on the premises to satisfy the distress:—

1. Implements of trade.

Implements of husbandry and trade not in actual use (*b*).

2. Cattle and sheep.

Beasts of the plough and sheep (*c*). The exemption of beasts of the plough does not extend to cart-colts and young steers not broken in or used for harness or the plough; but under sheep are included sheep of the lessee's under-tenant (*d*).

Sufficiency of distress.

In considering whether there is sufficient distress of other kinds, it is enough if it appears that there were reasonable grounds—such as the appraisalment of proper and competent persons at the time of taking—for supposing that the other distrainable goods would not have been sufficient to have satisfied the rent and expenses when sold. The actual result of the sale is not the test (*e*). Moreover, in ascertaining the other available distress, growing crops are not to be included. The landlord has the right to resort to subjects of distress which are immediately available to raise the arrears of rent by sale (*f*).

3. Agisted cattle.

Agricultural Holdings Act, 1883, s. 45.

At common law cattle at agistment were liable to distress (*g*). But now where live stock belonging to another person has been taken in by the tenant of a holding to which the Agricultural Holdings (England) Act, 1883 (*h*), applies (*i*), to be fed at a fair price (*k*), agreed to be paid for

(*b*) *Gorton v. Falkner*, 1792, 4 T. R. 565; *Roberts v. Jackson*, 1795, Peake, Add. Cas. 36; *Fenton v. Logan*, 1833, 9 Bing. 676; *Narrett v. Nis*, 1859, 1 E. & E. 439. As to ledger and other business books, see *Dauntlett v. King*, 1857, 3 C. B. N. S. 59.

(*c*) Co. Litt. 47 b; *Darves v. Aston*, 1845, 1 C. B. 746. 51 Hen. 3, stat. 4, by which the exemption of beasts "that gain the land" and sheep was enacted, was not included in the repeal of the statute by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125; see Statutes Revised, I. p. 75).

(*d*) *Keen v. Priest*, 1859, 4 H. & N. 236.

(*e*) *Jenner v. Yolland*, 1818, 6 Price, 3; *infra*, p. 262.

(*f*) *Piggott v. Birtles*, 1836, 1 M. & W. 441. As to pleading sufficiency of distress, see *Dawson v. Alford*, 1572, Dyer, 312 a.

(*g*) 1 Rol. Abr. 669, pl. 23.

(*h*) 46 & 47 Vict. c. 61.

(*i*) *Infra*, p. 502.

(*k*) This need not be a price in money: *London and Yorkshire Bank v. Belton*, 1885, 15 Q. B. D. 457. Cf. *Masters v. Green*, 1888, 20 Q. B. D. 807.

such feeding by the owner of such stock to the tenant, such stock is not to be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there is not to be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or, if any part of such price has been paid, exceeding the amount remaining unpaid (*l*).

Growing crops sold under an execution are liable to distress in default of sufficient distress of the goods of the tenant (*m*).

4. Growing crops sold under execution.

The goods of lodgers are protected from distress by the Lodgers' Goods Protection Act, 1871 (*n*), provided the requirements of the Act are complied with.

5. Lodgers' goods.

If any superior landlord (*o*) levies a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, the lodger may serve the superior landlord, or the bailiff employed to levy the distress, with a declaration in writing made by the lodger, setting forth that the immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of the lodger: and also setting forth whether any and what rent is due, and for what period, from the lodger to his immediate landlord; and the lodger may pay to the superior landlord or his bailiff the rent, if any, so due, or so much thereof as shall be sufficient to discharge the claim of the superior landlord. The declaration must have annexed to it a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration. If the lodger makes or subscribes the inventory and declaration knowing the same or either of them to be untrue in any material particular, he is guilty of a misdemeanor.

Lodgers' Goods Protection Act, 1871, s. 1.

(*l*) See the section further as to the right of the owner of the stock to redeem. Disputes under this section are to be settled in the county court or in a court of summary jurisdiction: sect. 46.

(*m*) *Supra*, p. 237.

(*n*) 34 & 35 Vict. c. 79.

(*o*) In England or Ireland. The Act does not extend to Scotland: sect. 4.

Sect. 3.

Any payment made by a lodger pursuant to sect. 1 is to be deemed a valid payment on account of any rent due from him to his immediate landlord.

Sect. 2.

If, notwithstanding service of the declaration and inventory, the distress is proceeded with, the person levying it is guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration of the goods. The superior landlord is also liable to an action at the suit of the lodger.

A lodger is entitled to protection if he has taken the premises from a person in ostensible possession, even though such person may be merely tenant at sufferance under negotiations for purchase of the lease. It is enough that the relation of tenant and landlord exists (*p*).

Who is a
lodger.

The existence of the relationship of landlord and lodger is a question of fact (*q*). The relationship may exist although the lodger is also under-tenant (*r*), or has the exclusive occupation of what is substantially the whole house (*r*), with the separate and uncontrolled right of egress and ingress (*s*); or though the landlord does not render any service to him (*t*), and does not even reside on the premises (*u*). What is essential to the relationship is the retention by the immediate landlord by himself or his servants of some such dominion and power over the house which he sub-lets as the master of a house let in lodgings usually has (*x*). The lodger himself may act as caretaker of the part reserved to his immediate landlord (*y*). But the lodger must sleep upon the premises, and a person who occupies part of premises for carrying on business, but sleeps and resides elsewhere, is not a lodger (*z*).

Declaration.

The declaration must be made after the distress has been

(*p*) *Bensing v. Ramsay*, 1898, 14 T. L. R. 345.

(*q*) *Ness v. Stephenson*, 1882, 9 Q. B. D. 245.

(*r*) *Phillips v. Henson*, 1877, 3 C. P. D. 26.

(*s*) *Toms v. Luckett*, 1847, 5 C. B. 23, 38.

(*t*) *Ness v. Stephenson*, 1882, 9 Q. B. D. 245, 249.

(*u*) *Morton v. Palmer*, 1881, 51 L. J. Q. B. 7.

(*x*) *Morton v. Palmer*, *supra*; *Ness v. Stephenson*, *supra*.

(*y*) *Ness v. Stephenson*, *supra*. As to the meaning of "lodger" for electoral purposes, see *Bradley v. Baylis*, 1881, 8 Q. B. D. 195; *Kirby v. Biffen*, 1881, *ib.* 201.

(*z*) *Hearwood v. Bone*, 1884, 13 Q. B. D. 179.

made or authorized or threatened (*a*). A declaration served by the lodger at the time of a distress for rent then due will not protect his goods upon a subsequent distress for the same arrears together with fresh arrears (*a*). And if the landlord sells the lodger's goods within the time allowed by law for the sale of a distress, the lodger may serve the declaration after the sale, and the landlord will be liable under the Act (*b*). The declaration need not state that the declarant is a lodger, or whether any rent is due to the immediate landlord. The absence of a statement on the latter point imports that no rent is due (*c*).

(b) WHERE DISTRESS MUST BE MADE.

A distress for the whole rent may be made on any part of the premises demised, but, generally speaking, a thing cannot be distrained for rent except on the premises demised (*d*). General rule.

It shall be lawful for no man, from henceforth, for any manner of cause, to take distresses out of his fee, nor in the king's highway, nor in the common street, but only to the king or his officers having special authority to do the same (*e*). 52 Hen. 3,
c. 15.
Subject not
to take dis-
tresses out of
his fee.

Thus, where a barge, floating with the tide, was attached by a rope to a wharf, it was held that the barge was not distrainable for rent due in respect of the wharf, the shore

(*a*) *Thwaites v. Wilding*, 1883, 12 Q. B. D. 4.

(*b*) *Sharp v. Fowle*, 1884, 12 Q. B. D. 385. The declaration may be in the following form :—

To Mr. [name of person on whom notice is to be served—i.e. either the superior landlord or the bailiff employed by him to levy the distress].

I, A. B., a lodger in the house No. —, — Street, Manchester, occupied by C. D. [name of immediate tenant], hereby declare that the said C. D. has no right of property or beneficial interest in the furniture, goods, and chattels specified in the inventory annexed hereto, and that such furniture, goods, and chattels are my property [or “are in my lawful possession”].

The sum of £— is due from me to the said C. D. for rent, from the — day of —, 188—, to the — day of — 188—.

(Signed) A. B.

The inventory referred to in the above declaration :—

[Here describe each article of furniture, &c.—e.g. 6 mahogany chairs covered with leather; 1 mahogany dining-table, &c., &c.]

(*c*) *Ex parte Harris*, 1885, 16 Q. B. D. 130.

(*d*) Per Best, C.J., in *Buszard v. Capel*, 1827, 4 Bing. at p. 140. As to a joint distress for rents reserved by the same deed upon separate reversions, see *Rogers v. Birkmire*, 1736, Cas. temp. Hard. 245; 2 Str. 1040; *Phillips v. Whitsed*, 1860, 2 E. & E. p. 809.

(*e*) See also 3 Edw. 1, c. 16.

between high and low water mark not being included in the demise (*f*). But where the demised premises are adjacent to a highway, there is a presumption that the right to the soil of one half the highway is in the tenant, and a waggon without horses standing on this half can be seized (*g*); and a paved part of the road adjacent to stables used for keeping a cart is, for the purpose of distress, deemed to be included in a demise of the stables (*h*).

Distress off
the demised
premises.

A power to distrain off the demised premises may be given by express agreement, and, provided the power is simply meant to secure payment of a *bonâ fide* rent, it will not be a "licence to take possession of personal chattels as security for a debt" within the meaning of sect. 4 of the Bills of Sale Act, 1878 (*i*). A power in a mining lease to distrain for rent upon chattels on an adjoining mine through which the coal is worked is also within the express exception of sect. 6 of the same Act (*k*).

Exceptions.

In the following cases, however, the landlord may distrain goods not upon the demised premises:—

1. Stock feed-
ing on com-
mon.

Under 11 Geo. 2, c. 19 (*kk*), s. 8, it is lawful for every landlord, or his bailiff, to seize, as a distress for rent, any cattle or stock of (his) tenant feeding upon any common appendant or appurtenant or anyways belonging to all or any part of the premises demised.

2. Cattle
which land-
lord, coming
to distrain,
sees on
demised pre-
mises.

If the landlord comes to distrain cattle which he sees then within his fee, but the tenant, or any other person, to prevent the landlord from distraining, drives the cattle out of the fee, the landlord may freshly follow and distrain them (*l*). But the landlord cannot distrain cattle out of his fee if, when coming to distrain, he did not see them within his fee, or if the cattle of themselves, after the landlord has seen them, go out of the fee, or if, after the landlord has seen the cattle, the tenant removes them for any other cause than to prevent the landlord from distraining (*l*).

(*f*) *Capel v. Buszard*, 1829, 6 Bing. 150. See *Lewis v. Read*, 1845, 13 M. & W. 834.

(*g*) *Hodges v. Lawrance*, 1854, 18 J. P. 347.

(*h*) *Gillingham v. Gwyer*, 1867, 16 L. T. 640.

(*i*) *Re Roundwood Colliery Co.*, 1897, 1 Ch. 373. See *Daniel v. Stepney*, 1874, L. R. 9 Ex. 185; *Thorpe v. Hurt*, W. N. 1886, p. 96.

(*k*) *Re Roundwood Colliery Co.*, *supra*.

(*kk*) The Distress for Rent Act, 1737. (*l*) Co. Litt. 161 a.

The Distress for Rent Act, 1737, s. 1 (*m*), provides that in case any tenant for life, years, at will, sufferance or otherwise of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent shall be reserved, due, or made payable (*n*), shall fraudulently or clandestinely convey away or carry off or from such premises his goods or chattels, to prevent the landlord from distraining the same for arrears of rent so reserved, due, or made payable, it shall be lawful for every landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing such conveying away or carrying off, to seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent, and the same to sell or otherwise dispose of in such manner as if the said goods and chattels had actually been distrained by such landlord upon such premises for such arrears of rent (*o*). No landlord, or other person entitled to such arrears of rent, shall seize any such goods or chattels as a distress for the same which shall be sold *bonâ fide*, and for a valuable consideration, before such seizure made, to any person not privy to such fraud as aforesaid (*p*).

Where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, or other person aiding or assisting therein, shall be put in any house, barn, stable, outhouse, yard, close or place locked up, fastened or otherwise secured, so as to prevent such goods or chattels from being seized as a distress for arrears of rent, it shall be lawful for the landlord, his steward, bailiff, receiver or other persons empowered, to seize, as a distress for rent, such goods and chattels,—first calling to his assistance the constable (*q*) or other peace officer of the hundred, borough, parish, district or place where the same shall be suspected

3. Fraudulent removal.

11 Geo. 2, c. 19, s. 1.

Landlord may, within thirty days, seize and sell goods fraudulently carried off.

Sect. 2.

Exception in case goods are *bonâ fide* sold before seizure.

Sect. 7.

Landlords may break open houses, &c., in which goods fraudulently removed are secured.

(*m*) This section replaces sect. 2 of 8 Anne, c. 18 (Ruff. c. 14), which was repealed by 30 & 31 Vict. c. 59.

(*n*) See *Anderson v. Midland Ry. Co.*, 3 E. & E. 614.

(*o*) See *Angell v. Harrison*, 1847, 17 L. J. Q. B. 25; if the occupier of the premises rescues the goods it is doubtful whether an action for treble damages—as in other cases of rescue (*infra*, p. 269)—will lie against him: *Harris v. Thirkell*, 1852, 20 L. T. O. S. 98.

(*p*) See *Williams v. Roberts*, 1852, 7 Ex. 618.

(*q*) The presence of a constable is essential: *Rich v. Woolley*, 1831, 7 Bing. 651, 658; but a special constable appointed for the occasion will suffice: *Cartwright v. Smith*, 1833, 1 Moo. & R. 284.

to be concealed, who are hereby required to aid and assist therein; and, in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein, —in the daytime (*r*), to break open and enter into such house, barn, stable, outhouse, yard, close and place, and to seize such goods and chattels for the said arrears of rent, as he might have done by virtue of this or any former Act if such goods and chattels had been put in any open field or place.

Sect. 3.

Penalty on tenant or person assisting in fraudulent removal of goods.

If any tenant shall fraudulently remove and convey away (or, without actual participation, shall be privy to the removal of (*s*)) his goods or chattels as aforesaid, or if any person shall wilfully and knowingly (being privy to the fraudulent intent (*t*)) aid or assist any such tenant in such fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing (*u*) the same (although no distress may be in progress or contemplated at the time (*r*)), every person so offending shall forfeit to the landlord double the value of the goods by him carried off or concealed as aforesaid; to be recovered by action of debt. In such an action the amount of rent due need not be proved as alleged in the claim (*x*).

Sect. 4.
Complaint
before
justices.

As an alternative remedy (*y*), where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of fifty pounds, the landlord, his bailiff, servant or agent in his behalf, may exhibit a complaint in writing against such offender before two or more justices of the peace of the same county, riding or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the

(*r*) A previous request is unnecessary before breaking into premises to seize goods: *Williams v. Roberts*, 1852, 7 Ex. 618.

(*s*) *Lyster v. Brown*, 1823, 1 C. & P. 121.

(*t*) *Brooke v. Noakes*, 1828, 8 B. & C. 537, 542. See *Stanley v. Wharton*, 1822, 10 Price, 138. (*u*) *Stanley v. Wharton*, 1821, 9 Price, 301.

(*v*) It is enough if the landlord is entitled to distrain, rent being at the time in arrear: *Stanley v. Wharton*, 1822, 10 Price, 138.

(*x*) See *Gwinnet v. Phillips*, 1790, 3 T. R. 643.

(*y*) *Bromley v. Holden*, 1828, M. & M. 175; *Horsefall v. Dacy*, 1816, 1 Stark. 169. As to the complaint, see *Ex parte Fuller*, 1844, 13 L. J. M. C. 141.

lands or tenements whence such goods were removed (z), who, after examining the parties concerned upon oath, may, by order under their hands and seals, adjudge the offender to pay double the value of the said goods and chattels to such landlord at such time as the said justices shall appoint.

Before availing himself of the provisions of this statute, the landlord should ascertain the following particulars:—

That there is at the time of the distress an actual existing tenancy (a), or, if the tenancy has terminated within six months, that the tenant is in possession. The statute confers upon the landlord a power to distrain in those cases in which, if the goods had not been removed, he might have distrained either under the common law or under the statute 8 Anne, c. 14, and though sect. 6 of the latter statute gives power to distrain after the determination of the tenancy, yet the power is subject to the limitations contained in sect. 7, one of which is that the distress must be levied “during the possession of the tenant from whom such arrears became due.” The statute 11 Geo. 2, c. 19, s. 1, does not help a landlord who could not have levied a distress if the goods had remained on the demised premises (b). An agreement for a lease, followed by entry, creates an immediate tenancy for the purpose of the statute at the rent specified in the agreement (c). And where the trustee in bankruptcy of the tenant uses the demised premises, he becomes tenant to the lessor and the statute applies (d).

That the goods removed belonged to the tenant. A stranger or lodger has a right to remove his goods off the

Requisites to proceedings under this statute.

1. Existing tenancy.

2. Goods belonging to tenant.

(z) Or a stipendiary magistrate : Stip. Magistrates Act, 1858, 21 & 22 Vict. c. 73, s. 1. As to the form of the order, see *R. v. Bissex*, 1756, Sayer, 304 ; *R. v. JJ. of Cheshire*, 1833, 5 B. & Ad. 439 ; *R. v. Middlehurst*, 1757, 1 Burr. 399 ; *R. v. Rabbitts*, 1825, 6 D. & Ry. 341 ; *R. v. Davis*, 1833, 5 B. & Ad. 551 ; *R. v. JJ. of Radnorshire*, 1840, 9 Dowl. 90. As to jurisdiction, *R. v. Morgan*, 1782, Cald. 156 ; *Coster v. Wilson*, 1838, 3 M. & W. 411. As to appeal to quarter sessions, 11 Geo. 2, c. 19, s. 5 ; *R. v. JJ. of Shropshire*, 1881, 6 Q. B. D. 669.

(a) See *Angell v. Harrison*, 1847, 17 L. J. Q. B. 25 ; *Ashmore v. Hardy*, 1836, 7 C. & P. 501.

(b) *Gray v. Stait*, 1883, 11 Q. B. D. 668, p. 672.

(c) *Anderson v. Mid. Ry. Co.*, 1861, 3 E. & E. 614. Cf. *supra*, p. 81.

(d) *Welch v. Myers*, 1816, 4 Camp. 368.

premises at any time, or under any circumstances (*e*), before the commencement of a distress (*f*). Hence the landlord cannot follow and seize goods removed by a bill of saleholder entitled under his bill of sale (*g*).

3. Fraudulent intent.

That the goods were carried off with the fraudulent intent on the part of the tenant of depriving the landlord of his remedy by distress (*h*). As against the tenant actual participation in the act of removal need not be proved. It is sufficient if the removal takes place with his privity (*i*). As against the person to whose premises the goods have been removed there is no need under sect. 1 to prove privity, or even to make a previous request before entering the premises (*k*).

It has been said that, in addition to fraudulent intent, it is essential that no sufficient goods shall remain on the premises to satisfy the rent then due (*l*); but this has been denied (*m*), and the statute does not appear to lay down any such condition.

It is for the landlord who has distrained upon goods removed from the premises to show fraudulent intent (*n*), and the question of fraud is for the jury (*o*).

When removal is fraudulent.

A removal of goods may be fraudulent though not clandestine. The words are "fraudulently or clandestinely," and the statute applies to a fraudulent removal although made openly with notice given to the landlord (*o*). And, as a rule, a removal will be fraudulent if the landlord is thereby turned over to his barren right of action (*o*). But the mere removal of goods by the tenant from the demised

(*e*) Per Martin, B., in *Foulger v. Taylor*, 1860, 5 H. & N. at p. 210; *Thornton v. Adams*, 1816, 5 M. & S. 38; *Postman v. Harrell*, 1833, 6 C. & P. 225; *Fletcher v. Murillier*, 1839, 9 A. & E. 457.

(*f*) *Wood v. Nunn*, 1828, 5 Bing. 10. As to the liability of the landlord for interfering to prevent the removal of a stranger's goods, see *England v. Cowley*, 1873, L. R. 8 Ex. 126.

(*g*) *Tomlinson v. Consol. Credit Corporation*, 1889, 24 Q. B. D. 135.

(*h*) *Parry v. Duncan*, 1831, 7 Bing. 243, 246; *John v. Jenkins*, 1832, 1 Cr. & M. 227.

(*i*) *Lister v. Brown*, 1823, 3 D. & Ry. 501.

(*k*) *Williams v. Roberts*, 1852, 7 Ex. 618.

(*l*) *Opperman v. Smith*, 1824, 4 D. & Ry. 33; *Parry v. Duncan*, 1831, 7 Bing. 243.

(*m*) *Gillam v. Arkwright*, 1850, 16 L. T. O. S. 88, per Patteson, J.

(*n*) *Inkop v. Morchurch*, 1861, 2 F. & F. 501.

(*o*) *Opperman v. Smith*, *supra*.

premises, when rent is in arrear, is not of itself fraudulent as against the landlord (*q*); nor is every conveying away of the goods of a tenant penal, although it may operate to defeat the landlord's right (*r*). It may not be fraudulent, for instance, if the tenant disputes the landlord's right (*s*).

To constitute a fraudulent removal the fraud must be that of the tenant or of the person removing the property for his benefit (*r*). The statute was never meant to extend to a creditor who is seeking payment of his debt *bonâ fide*; and such creditor may, for the purpose of satisfying such debt and with the assent of the debtor, take possession of his goods, and remove them from the premises without incurring any penalty under the statute, even though he knows that the debtor is in distressed circumstances, and is apprehensive that his goods may be distrained (*r*).

It has been held that it is necessary that rent should be actually due at the time of the removal of the goods (*u*), and, in spite of a doubt expressed by Lord Ellenborough in *Furneaux v. Fotherby* (*x*), the point was decided in this sense in *Rand v. Vaughan* (*y*). It is the place, it was said, not the time of the distress, to which the statute intends to apply the remedy. But *Rand v. Vaughan* was disapproved in *Dibble v. Bowater* (*z*), where it was held that the landlord was at any rate justified in following and distraining goods which had been removed on the morning of the day on which rent became due (*a*).

An action under the statute is a penal action (*b*). Consequently the plaintiff is not entitled to administer interrogatories (*c*), and his case must be strictly proved (*d*).

Within the metropolitan police district (*dd*) any constable may stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the

4. Rent due.

Action under the statute.

Removal of furniture in the metropolitan.

(*q*) *Parry v. Duncan*, 1831, 7 Bing. 243, 246.

(*r*) *Buch v. Meats*, 1816, 5 M. & S. 200, 204—206.

(*s*) *John v. Jenkins*, 1832, 1 Cr. & M. 227.

(*u*) *Watson v. Main*, 1799, 3 Esp. 15.

(*x*) 1815, 4 Camp. 136.

(*y*) 1835, 1 Bing. N. C. 767.

(*z*) 1853, 2 E. & B. 564.

(*a*) See *supra*, p. 194.

(*b*) Though held otherwise in *Stanley v. Wharton*, 1821, 9 Price, 301.

(*c*) *Hobbs & Co. v. Hudson*, 1890, 25 Q. B. D. 232.

(*d*) *Brooke v. Noakes*, 1828, 8 B. & C. 537.

(*dd*) See 10 Geo. 4, c. 41, s. 4.

furniture of any house or lodging between the hours of eight in the evening and six in the following morning, or whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent (*e*).

(c) WHEN DISTRESS MUST BE MADE.

8 Anne, c. 14,
s. 6.

Landlord
may distrain
for rent after
determina-
tion of lease.

Sect. 7.

Distress to be
made within
six months
after deter-
mination of
lease and
during pos-
session of
tenant.

At common law no distress can be made after the termination of the tenancy (*f*), but a limited right of distress is provided for this case by the Landlord and Tenant Act, 1709.

It shall be lawful for any person or persons, having any rent in arrear or due upon any lease for life or for years or at will ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title, and during the possession of the tenant from whom such arrears became due.

The statute only applies where the lease has determined. A custom of the country under which the tenant is entitled to leave his awaygoing crops in the barns, or to use the barns to thrash his corn and fodder his cattle, for a certain time after the expiration of the lease, operates as a prolongation of the term, and during such prolongation the landlord may distrain independently of the statute (*h*). Where there is an agreement to surrender a lease upon condition, and the condition is not performed, the tenancy continues to subsist, and with it the right of the landlord to distrain for arrears of rent (*i*).

The statute applies to cases in which the tenancy has been determined by lapse of time or notice to quit, but

(*e*) The Metropolitan Police Act, 1849 (2 & 3 Vict. c. 47), s. 67.

(*f*) *Williams v. Stirn*, 1846, 9 Q. B. 14.

(*g*) C. 18 in the Statutes Revised.

(*h*) *Beavan v. Delahay*, 1788, 1 H. Bl. 5, see note (*a*), p. 7; *Boraston v. Green*, 1812, 16 East, at p. 81; *Knight v. Bennett*, 1826, 3 Bing. 364, 366. See *infra*, p. 500.

(*i*) *Coupland v. Maynard*, 1810, 12 East, 134.

not to termination by forfeiture, as upon a wrongful disclaimer or for a breach of covenant (*k*).

A tenant who has left the premises will not be deemed to remain in possession by reason only of leaving a few goods there, these not being left with a view to keeping possession, and the landlord cannot in such a case distrain under the statute (*l*). Where the tenancy is determined by the death of the tenant—as where it is a tenancy at will—the possession of his administrator cannot be attributed to the tenancy so as to attract the statute (*m*); but it is otherwise where the tenancy continues, and the landlord can distrain if the administrator is in possession (*n*).

Possession
of tenant.

There is nothing in this statute confining its operation to a wrongful holding over, or to a holding of the whole of the demised premises (*o*). Hence, where a tenant, by permission of the landlord, remains in possession of part of a farm after the expiration of his tenancy, the landlord may distrain on that part within six months after the expiration of the tenancy (*p*). But it is otherwise if he remains in possession of part under a new agreement for a tenancy of that part, and such possession will not entitle the landlord to distrain on the part for the arrears of rent in respect of the entire premises (*q*).

Possession of
part of pre-
mises.

Although the tenant is not in default till the day after the rent is due, yet only nominal damages will be given if the landlord interferes after sunset of the rent day to prevent a threatened removal of goods (*r*).

A distress must be made in the daytime. If made before sunrise, or after sunset, it will be illegal, although at the time there may be ample daylight (*s*). Persons who distrain

Time at which
distress must
be made.

(*k*) *Doc v. Williams*, 1835, 7 C. & P. 322; *Grimwood v. Moss*, 1872, L. R. 7 C. P. p. 365; *Kirkland v. Briancourt*, 1890, 6 T. L. R. 441; *infra*, p. 470.

(*l*) *Taylorson v. Peters*, 1837, 7 A. & E. 110.

(*m*) *Turner v. Barnes*, 1862, 2 B. & S. 435.

(*n*) *Braithwaite v. Cooksey*, 1790, 1 H. Bl. 465.

(*o*) Judgment in *Nuttall v. Staunton*, 4 B. & C. at p. 56.

(*p*) *Nuttall v. Staunton*, 1825, 4 B. & C. 51.

(*q*) *Wilkinson v. Peel*, 1895, 1 Q. B. 516.

(*r*) *Lamb v. Wall*, 1859, 1 F. & F. 503. See *England v. Cowley*, 1873, L. R. 8 Ex. 126.

(*s*) *Aldenburgh v. Peuple*, 1834, 6 C. & P. 212; *Tutton v. Darke* 1860, 5 H. & N. 647; *Lamb v. Wall*, *supra*.

ought not, however, to go so near these limits as to raise any doubt on the subject (*t*).

Postponement
of right to
di-strain.

A landlord may expressly agree not to distrain for a certain time, or until a certain event (*u*); though where the rent is agreed to be paid "being lawfully demanded," the distress is a sufficient demand (*x*). Where there is no express contract, an agreement to postpone the distress may sometimes be implied; thus, on proof that the landlord of a farm permitted a sale by the tenant of the eatage of a pasture for a specified period, on condition that the amount produced by such sale was to be paid to the landlord, a contract may be inferred on his part not to distrain the cattle of the purchaser (*y*). But an express power of distress, exercisable at the expiration of a specified period after default in payment of rent, does not, in the absence of negative words, exclude the common law power, and this may be exercised immediately on default (*z*).

(d) AMOUNT FOR WHICH DISTRESS MAY BE MADE.

The common law does not cast any obligation on the person distraining to inform the tenant what is the amount of arrears for which the distress is made (*a*). The person distraining is entitled to a tender of the amount really due, and upon his refusal to accept that sum, the tenant's course is to replevy the goods (*b*). Hence no action can be maintained for distraining for more rent than is due, even when it is alleged to have been done maliciously (*c*), unless it appears that the goods seized and sold were of greater value than was necessary to satisfy the arrears of rent actually due (*d*).

Distress for
more rent
than is due.

(*t*) Per Martin, B., in *Tutton v. Darke*, 5 H. & N. at p. 655.

(*u*) *Giles v. Spencer*, 1857, 3 C. B. N. S. 244. See *Welsh v. Rose*, 1830, 6 Bing. 638.

(*x*) *Browne v. Dunnery*, 1618, Hob. 208; *Kind v. Ammery*, 1619, Hutton, 23.

(*y*) *Horsford v. Webster*, 1835, 1 Cr. M. & R. 696.

(*z*) *Re River Swale Brick Works*, 1883, 52 L. J. Ch. 638. See Litt. s. 331.

(*a*) Judgment in *Tancred v. Leyland*, 1851, 16 Q. B. at p. 680. See also 11 Ex. 879.

(*b*) *Glynn v. Thomas*, 1856, 11 Ex. 870. See *Fell v. Whitaker*, 1871, 41 L. J. Q. B. 78.

(*c*) *Sterenson v. Newnham*, 1853, 13 C. B. 285.

(*d*) *Wilkinson v. Terry*, 1834, 1 Moo. & R. 377; *Tancred v. Leyland*,

In distraining for rent the amount which can be recovered is limited by the Real Property Limitation Act, 1833 (*e*), s. 42, to six years' arrears, unless the time is extended by acknowledgment:—

Arrears of rent.

No arrears of rent, or any damages in respect of such arrears of rent, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

Six years' arrears of rent only recoverable by distress.

But so long as the relation of landlord and tenant lasts the right to recover the rent to the extent of six years' arrears is not barred by lapse of time (*f*). Sect. 1 of the Real Property Limitation Act, 1874 (*g*), which bars distress for rent after twelve years, applies to rent-charges, and not to conventional rents reserved on leases for years (*gg*).

A landlord entitled to the rent of any holding to which the Agricultural Holdings Act, 1883 (*h*), applies (*i*), is by sect. 44 prohibited from distraining for rent which became due in respect of such holding more than one year before the making of such distress; provided that, where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then, for the purpose of the section, the rent of the holding is to be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due (*k*).

Limitation in respect of agricultural holdings.

1851, 16 Q. B. 669; *Glyn v. Thomas*, 1856, 11 Ex. 870; *French v. Phillips*, 1856, 1 H. & N. 564.

(*e*) 3 & 4 Will. 4, c. 27. As to the limitation on a distress levied after the tenant's bankruptcy, see *infra*, p. 299.

(*f*) *Archbold v. Scully*, 1861, 9 H. L. C. 360.

(*g*) 37 & 38 Vict. c. 57.

(*gg*) *Grant v. Ellis*, 1841, 9 M. & W. 113.

(*h*) 46 & 47 Vict. c. 61.

(*i*) That is, an agricultural or pastoral holding, or market garden: sect. 54.

(*k*) See *Fairlumb v. Beaumont*, 1887, 31 Sol. Journ. p. 272, and see comments at p. 263. For the mode of settling by a county court or a court of summary jurisdiction any dispute in respect of a distress

In a case within the proviso the landlord is entitled to distrain for rent at the time of distress legally due, but not then payable according to the course of dealing, and also for rent which had become legally due more than a year previously, but had become payable according to the course of dealing less than a year previously, although the total amount distrained for exceeds one year's rent (l).

(e) MODE OF MAKING DISTRESS.

Employment of Bailiff.

Bailiff's
certificate.

The landlord may distrain in person (m); but the more prudent course is to employ a bailiff, and the bailiff must have a certificate properly granted under the Law of Distress Amendment Act, 1888 (n), s. 7:—

51 & 52 Vict.
c. 21, s. 7.

From the commencement of the Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses, and may be granted in such manner as may be prescribed by rules under the Act (o).

It is enough that the bailiff has authority from the judge of any county court, though not of the court where the premises are situate (p).

Under this section the managing director of an incorporated company is prohibited from distraining on behalf of the company. If he distrains, he distrains as bailiff (q).

contrary to the provisions of the Act, or in respect of distress generally on a holding to which the Act applies, see sect. 46.

(l) *Ex parte Bull*, 1887, 18 Q. B. D. 642.

(m) It appears that this is so notwithstanding the Law of Distress Amendment Act, 1888: *Jackson v. Bennan*, cited in Hunter's Law of Distress, 5th ed. p. 31.

(n) An uncertificated person who levies a distress is liable to a fine of 10*l.*; this is without prejudice to any civil liability: Law of Distress Amendment Act, 1888 (58 & 59 Vict. c. 24), s. 2.

(o) See the Distress for Rent Rules, 1888. The judge of the county court can cancel the certificate without reason assigned: Law of Distress Amendment Act, 1895, s. 1.

(p) *Re Sanders*, 1885, 54 L. J. Q. B. 331, decided on sect. 52 of the Agricultural Holdings Act, 1883.

(q) *Hogarth v. Jennings*, 1892, 1 Q. B. 907.

The bailiff should be authorized to act by a warrant of distress signed by the landlord (*r*), though such written warrant is not essential (*s*), and a corporation aggregate may appoint a bailiff to distrain without deed or warrant (*t*). An authority to distrain does not require a stamp (*u*); but it would seem that, if it contains an undertaking whereby the landlord engages to indemnify the bailiff, it should be stamped as an agreement (*x*). The landlord may ratify a distress made without authority (*y*); and a distress made after the death of the landlord, though by his direction, may be adopted by the executor, notwithstanding that it is made before probate (*z*).

Warrant of distress.

The person distraining is not justified in calling in a police officer unless there are threats of resistance, or apprehension of violence, or other similar circumstances (*a*).

The landlord is responsible to the tenant for irregularities committed by the bailiff in carrying out his instructions (*aa*); such, for instance, as selling the goods without notice of distress, or without appraisement (if appraisement is necessary) (*b*), or levying an excessive distress (*c*). But the landlord is not liable for the wrongful act of his bailiff in seizing what his warrant does not authorize him to

Landlord's liability to tenant for acts of bailiff.

(*r*) *Form of Warrant.*

To Mr. A. B., my bailiff.

Distrain such of the goods and chattels as may lawfully be distrained for rent in and upon the house[or farm] and premises occupied by C. D., situate at —, in the parish of —, in the county of —, for £—, being the amount of [one half-year's] rent due to me in respect of the same, on the — day of — last, and proceed thereon for the recovery of the said rent as the law directs.

E. F.

Dated the — day of —, 18—.

(*s*) See *Whitehead v. Taylor*, 1839, 10 A. & E. 210.

(*t*) *Cary v. Matthews*, 1 Salk. 191 (note); *Smith v. Birmingham Gas Co.*, 1834, 1 A. & E. 526. See *Strong v. Elliott*, *infra*, p. 272.

(*u*) See *Pyle v. Partridge*, 1846, 15 M. & W. 20.

(*x*) Compare wording of Stamp Act, 1891, Schedule, "Agreement," Exemption (1), with 55 Geo. 3, c. 184, on which it was held otherwise: *Cox v. Bailey*, 1843, 6 M. & Gr. 193.

(*y*) *Trevilian v. Pyne*, 1708, 11 Mod. 112. As by employing a solicitor to defend the bailiff, *Duncan v. Meikleham*, 1827, 3 C. & P. 172.

(*z*) *Whitehead v. Taylor*, *supra*.

(*a*) *Skidmore v. Booth*, 1834, 6 C. & P. 777.

(*aa*) See *Kinsella v. Hamilton*, 1890, 26 L. R. Ir. 671.

(*b*) *Haseeler v. Lemoyne*, 1858, 5 C. B. N. S. 530. See *infra*, p. 290, as to other irregularities.

(*c*) *Megson v. Mapleton*, 1884, 49 L. T. 744.

seize (*d*), unless the landlord ratifies the bailiff's act, with knowledge of the wrongful seizure (*e*), or chooses, without inquiry, to take the risk upon himself and to adopt the bailiff's acts (*f*).

Bailiff's
indemnity.

1. Implied.

2. Express.

An indemnity by the landlord to the bailiff is implied from the authority to distrain, but this extends only to acts properly done by him in the exercise of his authority (*g*).

Frequently, however, an express indemnity is appended to the distress warrant, and the effect of this will vary according to its terms. It has been held that after an authority to a bailiff to distrain the goods of the tenant, an indemnity against all costs and charges that he may be at on that account applies only to cases where the distress is illegal on the ground that the landlord has no right to put in a distress (*h*). An indemnity against all costs in respect of any law expenses, actions that may arise, and all charges or expenses on that account, extends to the costs of defending an action wrongfully brought against the bailiff by the tenant (*i*).

Bailiff's
liability to
landlord.

On the other hand, the duty of using proper care and diligence in ascertaining that the distress may be safely made is cast upon the bailiff in cases of ordinary distresses for rent, unless the landlord by his conduct has dispensed with it (*k*). The landlord may recover from the bailiff damage occasioned by his negligence or misconduct (*l*), as where the goods distrained are lost through want of reasonable care (*m*); or by irregularity in the distress, as where he makes an excessive seizure, so that the landlord is liable to the tenant (*n*).

(*d*) This seems to have been overlooked in *Hurry v. Rickman*, 1831, 1 Moo. & R. 126, where it was held that the landlord was *primæ facie* liable for the act of the bailiff in taking privileged goods, though he could avoid liability by repudiating the seizure as soon as it came to his knowledge. (*e*) See *Moore v. Drinkwater*, 1858, 1 F. & F. 134.

(*f*) *Lewis v. Read*, 1845, 13 M. & W. 834; *Freeman v. Rosher*, 1849, 13 Q. B. 780; *Haseler v. Lemoyne*, 1858, 5 C. B. N. S. 530. But see *Gauntlett v. King*, 1857, 3 C. B. N. S. 59, where it seems to have been assumed that a landlord giving a general authority to a broker to distrain is responsible if the broker exceeds his authority.

(*g*) See Bullen & Leake's Pleadings, 2nd ed. 152, n. (*a*).

(*h*) *Draper v. Thompson*, 1829, 4 C. & P. 84, 86.

(*i*) See *Ibbett v. De La Salle*, 1860, 6 H. & N. 233.

(*k*) Judgment in *Toplis v. Grane*, 1839, 5 Bing. N. C. at p. 651.

(*l*) 2 Ch. Pl. 7th ed. 503.

(*m*) *White v. Heywood*, 1888, 5 T. L. R. 115.

(*n*) *Megson v. Mapleton*, 1884, 49 L. T. 744.

Demand of Rent.

It is desirable, though not essential, that the arrears of rent should be formally demanded from the tenant before the distress is made. If the rent due, without any additional sum for expenses, is unconditionally tendered to the landlord, or his agent authorized to receive it (*o*), before seizure made, though after the warrant has been delivered to the bailiff, it is illegal to proceed with the distress (*p*). Where a landlord gives a warrant to distrain, it seems that he thereby necessarily authorizes the bailiff to receive the rent if tendered (*o*). A sufficient tender before the distress renders the whole proceeding illegal: a sufficient tender after the distress, but before the goods are impounded, renders the subsequent detainer illegal (*q*). But attending on the land to pay rent will not destroy the right to distrain, unless a tender is actually made (*r*).

Effect of
tender of
rent.

Entry.

In distraining, the landlord must not break into the premises, but, subject to this limitation, he can gain access to them, though the entry, if effected by a stranger, would be a trespass (*s*).

Entry to
distrain.

If the door of the house is shut, the landlord has authority by law to open it in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go into the premises (*t*); as, for instance, by lifting a latch or pulling out a staple which serves to keep the door closed (*t*).

Outer door.

But the *outer* door (*u*) or window (*r*) of the tenant's house

(*o*) *Hatch v. Hale*, 1850, 15 Q. B. 10.

(*p*) *Bennett v. Bayes*, 1860, 5 H. & N. 391. See *Branscomb v. Bridges*, 1823, 1 B. & C. 145; *Holland v. Bird*, 1833, 10 Bing. 15.

(*q*) See judgment in *Holland v. Bird*, 10 Bing. at p. 18. As to the effect of a tender after the goods are impounded, see *infra*, p. 272.

(*r*) *Horne v. Lewin*, 1701, 1 Ld. Raym. 639.

(*s*) *Long v. Clarke*, 1894, 1 Q. B. 119; *American Must Corp. v. Hendry*, 1893, 62 L. J. Q. B. 388.

(*t*) *Ryan v. Shilcock*, 1851, 7 Ex. 72, 76. See the observations of Cockburn, C.J., on the doctrine laid down in this case, in *Nash v. Lucas*, 1867, L. R. 2 Q. B. 594. See also *Curtis v. Hubbard*, 1 Hill's Rep. (New York) 336.

(*u*) See *Semayne's Case*, 1605, 5 Rep. 91; 1 Sm. L. C. 10th ed. p. 99.

(*v*) *Attack v. Bramwell*, 1863, 3 B. & S. 520. See *Hancock v. Austin*, 1863, 14 C. B. N. S. 634.

or of his stable or other building, whether within the curtilage of the dwelling-house or not (*x*), must not be forcibly broken open, or the landlord who has entered to distrain, and has sold the goods distrained, will be liable to an action of trespass, in which the tenant may recover the full value of such goods, although the proceeds of the sale have been applied in satisfaction of the rent (*y*). By the outer door is to be understood the main door of the house or building, not a gate which gives access to the premises from the road (*z*).

Inner door.

If the outer door is open, the person distraining may break open an inner door or lock (*a*).

Window.

It has been said that entry may be lawfully made through an open window (*b*), or by further opening a window which is already open (*c*); but it is illegal to open a window for the purpose of entering, whether such window is fastened with a hasp (*d*) or shut and not fastened (*e*). The landlord may lawfully gain access to the tenant's house by climbing over a wall or a fence (*f*); and he may enter by an open skylight (*g*).

When outer door may be broken open.

If, however, a lawful entry has once been effected, but the person distraining is forcibly turned out of possession (*h*), or, having temporarily left, is kept out of possession (*i*), there being no evidence of an abandonment of the goods (*k*), he is justified in breaking open the outer door in order to regain

(*x*) *Brown v. Glenn*, 1851, 16 Q. B. 254. See judgment of Bowen, L.J., in *American Must Corp. v. Hendry* (*supra*), and of Ld. Esher, M.R., in *Long v. Clarke* (*supra*). As to the exception in the case of goods which have been fraudulently removed, see *supra*, p. 245.

(*y*) *Attack v. Bramwell*, 1863, 3 B. & S. 520.

(*z*) *American Must Corp. v. Hendry*, *supra*.

(*a*) *Browning v. Dann*, 1736, Bull. N. P. 81; 2 Wms. Saund. ed. 1871, 664, note (1).

(*b*) Per Pollock, C.B., in *Nixon v. Freeman*, 1860, 5 H. & N. at p. 653; *Long v. Clarke*, 1894, 1 Q. B. 119. See *Gould v. Bradstock*, 1812, 4 Taunt. 562.

(*c*) *Crabtree v. Robinson*, 1885, 15 Q. B. D. 312.

(*d*) *Hancock v. Austin*, 1863, 14 C. B. N. S. 634, 639.

(*e*) *Nash v. Lucas*, 1867, L. R. 2 Q. B. 590.

(*f*) *Long v. Clarke*, 1894, 1 Q. B. 119; approving *Eldridge v. Stacey*, 1863, 15 C. B. N. S. 458, and questioning *Scott v. Buckley*, 1867, 16 L. T. 573.

(*g*) *Miller v. Tebb*, 1893, 9 T. L. R. 515.

(*h*) *Eagleton v. Gutteridge*, 1843, 11 M. & W. 465, 469; *Eldridge v. Stacey*, 1863, 15 C. B. N. S. 458.

(*i*) *Bunnister v. Hyde*, 1860, 2 E. & E. 627.

(*k*) See *infra*, p. 268.

possession. A delay of six days has been held to deprive the landlord of this right of forcible re-entry (*l*). But when a person has merely got his foot and arm between the door and the lintel, or by putting a pair of shears between the door and the lintel has prevented the door from being closed, he has not such a possession as will entitle him to break open a door or window in order to gain admission to the house (*m*). It seems that after the person distraining has lawfully entered, he may break open the outer door in order to remove the goods distrained (*n*).

It would appear that an actual entry upon the demised premises by the person distraining is not in all cases necessary. Where the article seized is just inside the door, the tenant being at the door, and the wife of the landlord, as his agent, in such a position as to be able in one moment to put her foot into the room, it will be taken that she is constructively in the room (*o*). Constructive entry.

Seizure.

Entry having been made, the next step is to seize the goods. For this purpose, any distinct expression of an intention to distrain will suffice, provided it is accompanied by definite acts carrying it substantially into effect (*p*). But mere intention, even if some steps are taken to carry it into effect, is not sufficient, if the landlord desists before completion (*q*). It is not necessary that an actual formal seizure should be made. It is enough if the landlord or his agent takes effectual means to prevent the removal of the goods from the premises (*r*); and the prevention is deemed to be effectual if the landlord declares that the goods shall not be removed till the rent is paid (*s*). This Seizure of goods distrained.

(*l*) *Russell v. Rider*, 1834, 6 C. & P. 416.

(*m*) *Boyd v. Profaze*, 1867, 16 L. T. 431.

(*n*) *Pugh v. Griffith*, 1838, 7 A. & E. 827.

(*o*) See judgment of Cockburn, C.J., in *Cramer v. Mott*, 1870, 39 L. J. Q. B. at p. 173.

(*p*) Bullen on Distress, 153. See *Swann v. Falmouth*, 1828, 8 B. & C. 456; *Hutchins v. Scott*, 1837, 2 M. & W. 809; *Thomas v. Harries*, 1840, 1 M. & Gr. 695; *Tenant v. Field*, 1857, 8 E. & B. 336; *Iredale v. Kendall*, 1878, 40 L. T. 362.

(*q*) *Spice v. Webb*, 1838, 2 Jur. 943.

(*r*) *Cramer v. Mott*, 1870, L. R. 5 Q. B. 357, p. 359, per Cockburn, C.J.

(*s*) *Cramer v. Mott*, *supra*; and 39 L. J. Q. B. p. 173.

constitutes a seizure (*t*), and the subsequent removal of the goods adversely to the landlord is unlawful. *A fortiori*, it amounts to a distress where the landlord claims the goods and tries to detain them (*u*). But unless there has been an actual distress, no action will lie at the suit of the landlord against a creditor of the tenant who removes the tenant's goods (*x*).

A seizure of some goods as a distress, in the name of all the goods in the house, will operate as a valid seizure of all the goods in the house (*y*). It is not necessary for the landlord to go into all the rooms of the house, if he makes an inventory of the goods seized, and puts a man into possession (*z*). And a seizure can be made without leaving a man in possession, if the articles seized are clearly indicated, and notice of the seizure given to the tenant (*a*).

But if goods are removed by the landlord which were not originally taken under the distress or included in the inventory because not discovered at the time, the tenant is entitled to maintain trover for them (*b*). And where the goods in the inventory are taken, and also others placed with them by the tenant, the doctrine of confusion does not apply so as to prevent the tenant bringing trespass (*c*).

Requisites to seizure.

1. Must not be excessive.

In making the seizure the following points should be observed:—

That the goods distrained do not greatly exceed in saleable value (*d*) the amount of the arrears of rent and costs of the distress. An excessive distress is forbidden both by the common law and by statute. Thus 52 Hen. 3, c. 4, provides as follows:—

“Distresses shall be reasonable and not too great, and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses.”

When, however, a landlord is about to make a distress,

(*t*) *Wood v. Nunn*, 1828, 5 Bing. 10.

(*u*) *Werth v. London & Westminster Loan Co.*, 1889, 5 T. L. R. 320

(*x*) *Pool v. Crawcour & Co.*, 1884, 1 T. L. R. 165.

(*y*) *Dod v. Monger*, 1705, 6 Mod. 215.

(*z*) *Tennant v. Field*, 1857, 8 E. & B. 336.

(*a*) *Swann v. E. of Falmouth*, 1828, 8 B. & C. 456.

(*b*) *Bishop v. Bryant*, 1834, 6 C. & P. 484.

(*c*) *Smith v. Torr*, 1862, 3 F. & F. 505.

(*d*) See *Wells v. Moody*, 1835, 7 C. & P. 59.

he is not bound to calculate very nicely the value of the property seized. It is sufficient if he takes care that some porportion is kept between that and the sum for which he is entitled to take it (*e*). All that the landlord is bound to do is to exercise a reasonable and honest discretion ; he is authorized to protect himself by seizing what any reasonable man would think adequate for the satisfaction of his claim (*f*).

If goods are seized (*ff*) to an excessive amount,—as, for instance, if goods worth between 30*l.* and 40*l.* are distrained for a rent of ten guineas (*g*), or goods worth 260*l.* for a rent of 121*l.* 15*s.* 6*d.* (*h*), or goods worth 100*l.* for a rent of 9*l.* (*i*), the landlord will be liable to an action for damages ; and the tenant is entitled in such action to recover a verdict with nominal damages, although he has had the use of the goods all the time and fails to prove any actual damage (*k*). Thus an action will lie for an excessive distress and leaving a man in possession, although the tenant's goods are not so completely removed from his control as to prevent him from carrying on his business (*l*) ; and it is the same where the landlord is precluded from removing the goods, as in the case of cut or growing corn, although in most such cases the damages would be all but nominal (*m*). But a mere intention to distrain does not give a cause of action for excessive distress ; hence in the case of fixtures there is no excessive distress unless something is physically done to them, so as to make them of less value to the tenant. It is not enough that they are included in the inventory and notice of sale (*n*).

Action for
excessive
distress.

(*e*) *Willoughby v. Backhouse*, 1824, 2 B. & C. p. 823.

(*f*) *Roden v. Eyton*, 1848, 6 C. B. 427, per Wilde, C.J., at p. 430.

(*ff*) See *Crowder v. Self*, 1839, 2 Moo. & R. 190.

(*g*) *Branscombe v. Bridges*, 1822, 3 Stark. 171.

(*h*) *Chandler v. Doulton*, 1865, 3 H. & C. 553.

(*i*) *Fell v. Whittaker*, 1871, L. R. 7 Q. B. 120.

(*k*) *Piggott v. Birtles*, 1836, 1 M. & W. 441 ; *Chandler v. Doulton*, 1865, 3 H. & C. 553. And as to damages, see *Grace v. Morgan*, 1836, 2 Bing. N. C. 534.

(*l*) *Baylis v. Usher*, 1830, 4 Moo. & P. 790. S. C., *Bayliss v. Fisher* 7 Bing. 153.

(*m*) *Piggott v. Birtles*, 1836, 1 M. & W. 441, 450. As to damages for sale of young crops before they are cut, see *Proudllove v. Twemlow*, 1833, 1 Cr. & M. p. 329 ; and as to pleadings in an action for excessive distress, see *Thompson v. Wood*, 1843, 4 Q. B. 493 ; *Sells v. Hoare*, 1824, 1 Bing. 401.

(*n*) *Beck v. Denbigh*, 1860, 29 L. J. C. P. 273.

When distress
is excessive.

For the purpose of determining whether a distress is excessive, the price which the goods realize at a sale by auction is good *primâ facie* evidence of their value (*o*). But it has been held that an actual sale made under the distress, though not proved to be fraudulent or unfair, is not a conclusive test of value, and the tenant may therefore maintain an action, although the sale of the goods distrained (less the expenses) did not realize the amount of rent due (*p*). An appraisalment of goods by two sworn appraisers under 2 Will. & M. sess. 1, c. 5, is only *primâ facie* evidence of value (*q*). If only a single chattel is to be found on the premises, the person distraining will not be liable to an action for excessive distress, though the value of such chattel exceeds the amount of the rent due (*r*).

Excessive
distress on
goods of
third party.

The action lies also at the suit of a third party whose goods have been seized, whether a lodger (*s*) or a stranger, and damages should be awarded to him in the proportion of the value of his goods to that of the whole goods distrained (*t*). Where the goods of the tenant have been assigned to a trustee for his wife, the tenant has, from his enjoyment of the use of them, a special property which entitles him to maintain an action for excessive distress (*u*).

2. Sufficient
must be taken.

While avoiding an excessive seizure, however, the person distraining should take sufficient to cover the arrears of rent; for he cannot distrain twice for the same rent where he might have taken sufficient at first (*x*). There are, however, circumstances under which the landlord may distrain again, if it is not done vexatiously (*y*). Where there is a mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper amount at the first levy, and afterwards finds it insufficient, he may

When second
distress may
be made for
same rent.

(*o*) *Rapley v. Taylor*, 1883, C. & E. 150; *Wells v. Moody*, 1835, 7 C. & P. 59. (*p*) *Smith v. Ashforth*, 1860, 29 L. J. Ex. 259.

(*q*) *Cook v. Corbett*, 1876, 24 W. R. 181.

(*r*) *Avenell v. Croker*, 1828, Moo. & M. 172. See *Field v. Mitchell*, 1807, 6 Esp. 71.

(*s*) *Fisher v. Algar*, 1828, 2 C. & P. 374; *Wilkinson v. Ibbett*, 1860, 2 F. & F. 300. (*t*) *Bail v. Mellor*, 1850, 19 L. J. Ex. 279.

(*u*) *Fell v. Whittaker*, 1871, L. R. 7 Q. B. 120.

(*x*) *Wallis v. Savill*, 1702, 2 Lutw. 1532. Judgment of Parke, B., in *Bigge v. Mawby*, 1853, 8 Ex. 641; *Dawson v. Cropp*, 1845, 1 C. B. 961; *Lear v. Caldicott*, 1843, 4 Q. B. 123. See *Smith v. Goodwin*, 1833, 4 B. & Ad. 413.

(*y*) *Crosse v. Welch*, 1892, 8 T. L. R. 709, per Lord Esher, M.R.

distrain for the balance (*z*); and so if he forbears realizing the first distress at the request of the tenant (*a*). But if there is a fair opportunity, and there is no lawful cause why he should not work out the payment of the rent by the first distress, his duty is to work it out by that distress, and he cannot distrain again (*a*).

A distress withdrawn under an arrangement for payment of the arrears of rent by the tenant is not voluntarily withdrawn, and the landlord may distrain again if the arrangement is not carried out (*b*). In the event of such second distress, a lodger's goods are not protected by a notice given in the first distress (*c*).

The landlord may also distrain again if he is prevented by the unlawful act of the tenant from realizing the distress (*d*); if, for instance, the tenant prevents a purchaser from taking away an article sold under the distress (*d*). But a warning from a creditor not to sell on the ground that bankruptcy proceedings are imminent is no excuse for not realizing the first distress (*e*).

A plea that the landlord levied sufficient distress is not a good defence to further proceedings for the rent, unless it is also alleged that the rent was thereby satisfied (*f*). But if the landlord by consent retains the goods for the rent, this will support a plea of accord and satisfaction (*ff*).

Impounding.

After seizing the goods, the person distraining must impound them. Formerly it was necessary to remove the goods Where goods may be impounded.

(*z*) *Hutchins v. Chambers*, 1758, 1 Burr. p. 589.

(*a*) *Bagge v. Mawby*, 1853, 8 Ex. 641, p. 649, per Parke, B.; *Hutchins v. Chambers*, 1758, 1 Burr. 589; *Owens v. Wynne*, 1855, 4 E. & B. p. 584. But it seems that arrears not included in a first distress can be recovered in a distress for rent accruing due subsequently: *Gambrell v. E. of Falmouth*, 1835, 4 A. & E. 73.

(*b*) *Thwaites v. Wilding*, 1883, 12 Q. B. D. 4. An arrangement between landlord and tenant for withdrawing a distress cannot be avoided on the ground of duress of goods. If the distress is wrongful, the tenant has his remedy in replevin: *Skeate v. Beale*, 1840, 11 A. & E. 983, 990; *Kuibbs v. Hall*, 1794, 1 Esp. 84.

(*c*) *Thwaites v. Wilding*, *supra*. See *supra*, p. 243.

(*d*) *Lee v. Cooke*, 1857, 2 H. & N. 584; 3 H. & N. 203.

(*e*) *Bagge v. Mawby*, *supra*.

(*f*) *Lingham v. Warren*, 1820, 2 Br. & B. 36; and see *Lear v. Edmonds*, 1817, 1 B. & A. 157; *Hudd v. Ravenor*, 1821, 2 Br. & B. 662.

(*ff*) *Jones v. Sawkins*, 1847, 5 C. B. 142.

goods from the premises where they had been seized to a suitable pound (*g*). Such pound might be overt or covert—that is, open overhead or roofed in; though goods liable to suffer damage from the weather could not be put into an open pound (*h*). But under the Distress for Rent Act, 1737, goods may be impounded on the demised premises:—

11 Geo. 2,
c. 19, s. 10.
Goods dis-
trained may
be secured
and sold on
premises.

It shall be lawful for any person lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent as shall be most convenient for the impounding and securing such distress; and to appraise, sell and dispose of the same upon the premises in like manner and under the like directions and restraints as any person taking a distress for rent may now do off the premises by virtue of (stats. 2 Will. & M. c. 5, and 4 Geo. 2, c. 28); and it shall be lawful for any person to come and go to and from such place where any distress for rent shall be impounded, in order to view, appraise and buy, and also in order to carry off the same on account of the purchaser thereof; and if any pound-breach or rescous shall be made of any goods or chattels, or stock distrained for rent, and impounded by virtue of this Act, the person aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given by the said statute (*kk*).

What
constitutes
impounding.

In order to constitute an impounding, it is not necessary that the whole of the goods distrained should be put together (*i*). A distress is sufficiently impounded where, with the consent of the tenant, the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant, and leaves a man in possession, but does not disturb, lock up, or remove any of the goods (*k*).

Furniture.

Furniture may be secured in a room or rooms of the tenant's house, or, if the tenant gives permission, may be

(*g*) As to the liability of the pound-keeper where the distress was wrongful, see *Bulkin v. Powell*, 1776, 2 Cowp. 476.

(*h*) Co. Litt. 47 b.

(*i*) Per Lord Campbell, C.J., in *Johnson v. Upham*, 1859, 2 E. & E. at p. 255. See *Washborn v. Black*, 1809, 11 East, 405, note (*a*).

(*k*) *Johnson v. Upham*, 1859, 2 E. & E. 250.

(*kk*) *Infra*, p. 269.

left in its ordinary position (*l*). Where the landlord entered to distrain, and to prevent inconvenience to the tenant, and with the tenant's assent, instead of removing the articles of furniture on which he proposed to distrain, made up from a list given him by the tenant an inventory of the furniture in the house, put a man in possession, and handed to the tenant a notice of distress referring to the inventory, but did not go into the several rooms; this was held to be a distraining of the articles in the inventory, and an impounding on the premises (*m*). Where such permission, as above mentioned, is not given, in common cases a person distraining in a dwelling-house must not take the whole of it in which to place the goods distrained, but must select one room for that purpose, or remove the goods out of the house (*n*). An action of trespass lies against a landlord who, on making a distress for rent, turns the tenant's wife out of possession and keeps the premises on which he has impounded his distress (*o*). It seems, however, that the whole house may be locked up, where it is absolutely necessary for the safe keeping of the goods distrained (*p*).

Provision for impounding certain kinds of agricultural produce was made by 2 Will. & M. sess. 1, c. 5, s. 2:—

Persons distraining sheaves or cocks of corn, or corn loose or in the straw, or hay in any barn or stack or otherwise upon any part of the land, may lock up or detain the same in the place where the same shall be found, until the same shall be replevied; and in default of replevying the same within the prescribed time (*q*) (sect. 1), may sell the same [after appraisement thereof (*r*)]; so as, nevertheless, such corn, grain or hay be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied or sold.

Corn, straw,
or hay.

May be
impounded in
place where
found.

(*l*) See *Cox v. Painter*, 1837, 7 C. & P. 767; *Washborn v. Black*, 1809, 11 East, 405, note (*a*); *Tennant v. Field*, 1857, 8 E. & B. 336.

(*m*) *Tennant v. Field*, *supra*.

(*n*) Per Parke, B., in *Woods v. Durrant*, 1846, 16 M. & W. at p. 158.

(*o*) *Etherton v. Popplewell*, 1800, 1 East, 139; *Smith v. Ashforth*, 1860, 29 L. J. Ex. 259.

(*p*) See 16 M. & W. p. 158; *Cox v. Painter*, *supra*.

(*q*) *Infra*, p. 276.

(*r*) *Infra*, p. 274.

Growing
crops.

11 Geo. 2,
c. 19, s. 8.

Growing
crops when
ripe, may be
impounded in
barns on
farm.

Sect. 9.

Notice of
place where
crops are
deposited to
be given to
tenant.

Cattle.

1 & 2 Ph. &
M. c. 12.

Cattle
distrained
not to be
driven out of

And provision for impounding growing crops is made by the Distress for Rent Act, 1737.

The landlord, or his bailiff or other person empowered by him, who has distrained growing crops, may lay up the same when ripe in the barns or other proper place on the premises demised; and in case there shall be no barn or proper place on the premises demised, then in any other barn or proper place which such landlord shall hire or otherwise procure for that purpose, and as near as may be to the premises, and in convenient time appraise (s), sell or otherwise dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement and sale, in the same manner as other goods and chattels may be seized, distrained and disposed of; and the appraisement thereof to be taken when cut, gathered, cured and made, and not before. Notice of the place where the goods and chattels so distrained shall be deposited is, within one week after the depositing thereof in such place, to be given to the tenant or left at the last place of his abode; and the tenant can redeem the goods on payment of the arrears of rent together with the full costs and charges of making the distress and which have been occasioned thereby.

Cattle may be impounded in the byre or field where they are at the time of the distress. Where the distrainer left with the tenant a note stating the number of cattle seized, and on the following morning sent the tenant a notice of the distress, and that the distrainer had impounded the cattle on the premises, it was held that the impounding was complete (u). Or they may, as under the former law, be driven to a pound off the premises, but the distance to which they may be driven is limited by statute.

No distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such distress shall be taken, except to a pound overt within the same shire (x), not above three miles distant from the place where the said distress is

(s) See *infra*, p. 274.

(u) *Thomas v. Harries*, 1840, 1 M. & Gr. 695. See *Castleman v. Hicks*, 1842, Car. & M. 266.

(x) Where there is a distress on lands in two adjoining counties let in the same lease at an entire rent, the cattle ought to be driven to the same pound: *Walter v. Rumball*, 1696, 1 Ld. Raym. p. 54.

taken (*y*). No cattle or other goods distrained at one time shall be impounded in several places, whereby the owner of such distress shall be constrained to sue several replevies for the delivery of the said distress so taken at one time ; upon pain every person offending contrary to this Act shall forfeit to the party aggrieved, for every such offence, a hundred shillings and treble damages.

hundred, &c., where taken, except to pound in same shire not more than three miles distant.

Impounding in another county does not make the distrainer a trespasser, but only subjects him to the penalty in the statute (*z*). On this statute only one single penalty can be recovered, though several persons join in committing the offence (*a*).

Formerly cattle in an open pound had to be maintained by the owner of the cattle at his own peril ; but cattle in a close pound by the person distraining (*b*). Now, whenever cattle are driven off the premises and placed in a pound, the person impounding is bound by 12 & 13 Vict. c. 92 (*bb*), s. 5, to maintain them ; and, in default of his so doing, any person may supply food and water and may recover the expenses (*c*). This enactment does not apply to the keeper of the pound in which the animal is impounded (*d*).

Maintenance of impounded cattle.

Persons impounding animals to supply food and water.

The person distraining must not use the goods or work the cattle he has impounded. If he takes an animal out of the place where it was originally impounded for the purpose of making an unlawful use of it, the owner is justified in interfering and recovering possession of the animal (*e*). Milch cows which have been impounded may, however, be milked by the person distraining (*f*).

Goods distrained must not be used.

If the condition of the pound is such that it is unfit to put cattle in at the time of the impounding, whether its usual

Injuries to goods impounded.

(*y*) See also 52 Hen. 3, c. 4, and 3 Edw. 1, c. 16, which forbid a distress to be driven out of the county.

(*z*) *Woodcroft v. Thompson*, 1683, 3 Lev. 48 ; *Gimbart v. Pelah*, 1748, 2 Str. 1272.

(*a*) *Partridge v. Naylor*, 1596, Cro. Eliz. 480 ; *R. v. Clark*, 1777, 2 Cowp. p. 612.

(*b*) Co. Litt. 47 b ; 51 Hen. 3, stat. 4, expressly empowers the owner to feed impounded cattle. (*bb*) The Cruelty to Animals Act, 1849.

(*c*) And as to recovery of expenses, see further the Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), s. 1 ; *Dargan v. Davies*, 1877, 2 Q. B. D. p. 123 ; *Layton v. Hurry*, 1846, 8 Q. B. 811.

(*d*) *Dargan v. Davies*, 1877, 2 Q. B. D. 118.

(*e*) *Smith v. Wright*, 1861, 6 H. & N. 821.

(*f*) See *Bagshawe v. Goward*, 1607, Cro. Jac. at p. 148.

condition be suitable or not, the person distraining is responsible for injury thereby occasioned to the animals (*g*). But if they die in the pound or escape without any default on the part of the person distraining, he is not answerable, and, it seems, he may distrain again (*h*).

Abandonment
of distress.

It is usual for the person distraining to leave a man in possession of the goods distrained; but the quitting possession of goods by the landlord after he has distrained them is not necessarily an abandonment of the distress (*i*). Whether the landlord has or has not abandoned the distress is a question of fact to be determined by a jury (*k*). An abandonment will not be inferred where the broker is forcibly expelled, and regains possession after an interval of three weeks (*k*)—though in one case a delay of six days was held to be too long (*l*); or where the man in possession, having quitted the house in which the goods are impounded in order to obtain refreshment, finds on his return the door locked against him by the tenant, and breaks it open for the purpose of re-entering (*m*); or where the person distraining has permitted the goods of a stranger, who has had no notice of the distress, to be taken off the premises merely for a temporary purpose, and they are subsequently restored by the voluntary act of the person who took them away (*n*). And the impounding continues notwithstanding that the man in possession leaves the premises for the night or from Saturday to Monday (*o*).

Rescue or
pound-breach.

Where goods distrained are withdrawn from the control of the distrainer against his will, a rescue or pound-breach is committed (*p*). But it is no rescue to retake cattle which the distrainer has permitted to escape (*q*).

(*g*) Per Bramwell, B., in *Bignell v. Clarke*, 1860, 5 H. & N. at p. 487; *Wilder v. Speer*, 1838, 8 A. & E. 547.

(*h*) *Vasper v. Eddows*, 1701, 1 Salk. 248.

(*i*) Per Wightman, J., in *Bannister v. Hyde*, 1860, 2 E. & E. at p. 631. See *Swann v. Fulmouth*, 1828, 8 B. & C. 456.

(*k*) *Eldridge v. Stacey*, 1863, 15 C. B. N. S. 458, 459; *Bagshawes (Lim.) v. Deacon*, 1898, 2 Q. B. 173. See *Smith v. Torr*, 1862, 3 F. & F. 505.

(*l*) *Russell v. Rider*, 1834, 6 C. & P. 416.

(*m*) *Bannister v. Hyde*, 1860, 2 E. & E. 627.

(*n*) *Kerby v. Harding*, 1851, 6 Ex. 234.

(*o*) *Jones v. Beirstein*, 1899, 68 L. J. Q. B. 267.

(*p*) See Co. Litt. 160 b. As to pound-breach by sale of goods under distress, see *Iredale v. Kendall*, 1878, 40 L. T. 362; *Reddell v. Stowey* 1841, 2 Moo. & R. 358; *Turner v. Ford*, 1846, 15 M. & W. 212, 215.

(*q*) *Knowles v. Blake*, 1829, 5 Bing. 499.

A remedy against pound-breach is provided by statute as follows:—

Upon any pound-breach or rescue of goods distrained for rent, the person grieved thereby shall recover treble damages, and (a full and reasonable indemnity as to all costs, charges and expenses incurred in and about the action (*r*)) against the offender or offenders in any such rescue or pound-breach, any or either of them, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession (*s*). 2 Will. & M. sess. 1, c. 5, s. 3.

An action under this statute in which the plaintiff claims treble damages is a penal action, and the plaintiff is not entitled to discovery of documents (*t*). The plaintiff need not show his right to distrain (*u*), and the action will lie without proof of special damage (*x*). Tender of rent and costs after the impounding is no defence to the action (*y*).

The landlord may seize again the rescued goods wherever he may happen to find them, if he can do so without breach of the peace, and upon fresh pursuit (*z*). If he abandons the distress, the tenant may retake it without committing a rescue (*a*).

(f) REQUISITES TO SALE UNDER DISTRESS.

Previously to the statute 2 Will. & M. sess. 1, c. 5, goods seized by way of distress could only be detained by the landlord as a pledge; since the statute they may either be sold, or kept as a pledge until they are replevied or the arrears of rent with expenses are paid.

Where any goods or chattels are distrained for any rent due upon any lease or contract, and the tenant or owner of Sale under 2 Will. & M. sess. 1, c. 5, s. 1.

(*r*) For the treble costs given by the statute the Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), substitutes the words in the text. See *Lawson v. Storey*, 1694, 1 Ld. Raym. 19. As to the effect of payment into court in this action, see *Story v. Finnis*, 1851, 6 Ex. 123.

(*s*) Also under 6 & 7 Vict. c. 30, s. 1, persons guilty of pound-breach are liable to a fine of 5*l.* on conviction before justices.

(*t*) *Jones v. Jones*, 1889, 22 Q. B. D. 425; though held otherwise in *Castleman v. Hicks*, 1842, Car. & M. 266.

(*u*) *Cotsworth v. Betison*, 1697, 1 Ld. Raym. 104.

(*x*) *Kemp v. Christmas*, 1898, 79 L. T. 233.

(*y*) *Firth v. Purvis*, 1793, 5 T. R. 432.

(*z*) *Rich v. Woolley*, 1831, 7 Bing. 651, per Tindal, C.J., at p. 661.

(*a*) *Dod v. Monger*, 1705, 6 Mod. at p. 216.

the goods so distrained shall not, within five days (*b*) next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house or other most notorious place on the premises charged with the rent distrained for, replevy the same with sufficient security, then in such case, after such distress and notice as aforesaid, and expiration of the said five days (*b*), the person distraining shall and may cause the goods and chattels so distrained to be appraised (*c*) by two (*d*) appraisers, "according to the best of their understandings," and after such appraisement shall and may lawfully sell the goods and chattels distrained for the best price that can be got for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale.

The statute is permissive and not compulsory (*dd*), and no action lies for not selling (*e*).

Inventory and
notice.

If it is intended to sell the goods distrained, an inventory of them must be made, which should express clearly and with certainty what goods are taken, and at the foot of the inventory there must follow the statutory notice of the distress in writing (*f*), stating the cause of taking, and also, if the goods are distrained under the Distress for Rent Act, 1737 (*g*), the place where they are lodged or deposited (*g*).

In one case it was held, though with reluctance, that an inventory specifying only one article, followed by an "&c." and the words "and any other goods and effects that may

(*b*) The time may be extended to fifteen days : *infra*, p. 276.

(*c*) Appraisement is now necessary only where required by the tenant or owner of the goods in writing : *infra*, p. 274.

(*d*) The statute contained words requiring the sheriff or under-sheriff of the county or the constable of the parish to assist in the distress, and to administer the oath to the appraisers, who were required to be sworn. These words are repealed, and no oath is now necessary for the appraisers : 35 & 36 Viet. c. 92, s. 13.

(*dd*) But as to corn and growing crops, see *Piggott v. Birtles*, 1836, 1 M. & W. p. 448.

(*e*) *Hudd v. Ravenor*, 1821, 2 Br. & B. 662 ; *Lear v. Edmonds*, 1817, 1 B. & A. 157.

(*f*) *Wilson v. Nightingale*, 1846, 8 Q. B. 1034.

(*g*) 11 Geo. 2, c. 19, s. 9. The inventory and notice may be in the following forms :—

An inventory of the goods and chattels distrained by [A. B., of —, as bailiff of and for] E. F., of —, this — day of —, 18—, in and upon the house [farm] and premises in the occupation of C. D., situate at —, in the parish of —, in the county of —, for

be found in or about the said premises to pay the said rent and expenses of this distress," was sufficient to cover all the goods on the premises (*h*); but it is not safe to leave the list so indefinite, and words in a notice purporting to cover all goods on the premises that might be required to satisfy the rent and expenses were held to be too vague to justify the sale of the goods of a stranger which had been deposited on the premises (*i*).

The landlord is not bound by the statement of the cause of taking contained in the notice, since he may distrain for one cause and afterwards, in a replevin or other action, may avow or justify for a different cause (*k*). Thus if a person having authority to distrain for rent due to another says at the time that he is distraining for rent due to himself, he may nevertheless justify as bailiff for the other (*l*). It is £——, being the amount of [one half-year's] rent due to the said E. F. in respect of the same premises on the —— day of ——, 18—.

Statement of
cause of
distress.

Goods in the Dwelling-house.

Kitchen.—One table [describe similarly the furniture seized in each room].

Cattle in the Fields.

Field called Thorncroft.—One white milch cow, one bay horse, six Leicester ewes [describe similarly the cattle seized in each field].

Growing Crops.

Field called Holme.—About three acres of barley [describe similarly the crops in each field].

To Mr. C. D.

Take notice that I [as bailiff of and for Mr. E. F., your landlord] have this day distrained, on the premises above mentioned, the goods and chattels specified in the above inventory, for £——, being the amount of [one half-year's] rent due to [me, or the said E. F.] in respect of the said premises, on the —— day of ——, 18—, [which goods are secured upon the said premises, or, if removed, are lodged or deposited at ——]. And unless you pay the said rent, together with the charges of distraining for the same, within five days (or such other number of days not exceeding 15 as you may name in a request in writing in that behalf) from the service hereof, the said goods and chattels will be sold according to law [in a distress of growing crops, after the word "*same*," say, the said growing crops, when ripe, will be cut, gathered, cured and laid up in the barn or other proper place on the said premises, and in convenient time sold towards satisfaction of the said rent, and of the charges of such distress, according to law].

Dated, &c.

E. F.

[or A. B., bailiff of the said E. F.].

(*h*) *Wakeman v. Lindsey*, 1850, 14 Q. B. 625.

(*i*) *Kerby v. Harding*, 1851, 6 Ex. 234.

(*k*) *Gwinnet v. Phillips*, 1790, 3 T. R. 643; *Crowther v. Ramsbottom*, 1798, 7 T. R. 654, 658. Judgment in *Etherton v. Popplewell*, 1800, 1 East, at p. 142. See *Phillips v. Whitsed*, 1860, 2 E. & E. 804.

(*l*) *Wootley v. Gregory*, 1828, 2 Y. & J. 536; *Trent v. Hunt*, 1853, 9 Ex. 14; though a notice stating rent to be due to a person who was clerk of a corporation was insufficient where the rent was due to the corporation :

not necessary to specify in the notice when the rent for which the distress is made became due (*m*).

The want of notice does not render a distress invalid, but if the person distraining proceeds to sell the goods distrained (*n*), he will be liable to an action for irregular distress. The omission to state in the notice that the goods are impounded does not make the impounding void (*o*).

The inventory and notice may be served personally on the tenant, notwithstanding the direction of the statute that they shall be left at the chief mansion house or other most notorious place on the premises (*p*).

Tender of rent
and expenses
before im-
pounding.

After the goods have been seized, but before they are impounded, the tenant may tender the amount of rent actually due, and the expenses of the distress, either to the landlord (*q*) or his agent or bailiff (*r*); and after such tender it is illegal to proceed with the distress, or to detain the goods distrained (*s*). A man left by the bailiff in possession has, however, no implied authority to receive a tender of the rent (*t*). In this respect a subordinate of the bailiff differs from the bailiff himself. It would seem that the landlord cannot withdraw authority to receive a tender from a bailiff who conducts the distress without the personal intervention of the landlord (*u*). A solicitor who gives an undertaking to pay the rent to the value of the goods distrained renders himself personally liable (*x*).

Tender after
impounding.

Formerly a tender after goods had been impounded did not render the subsequent detention of them illegal, for then the case was put to the trial of the law to be there

Strong v. Elliott (Exeter County Court, Serjeant Petersdorff, 7 May, 1868, 12 Sol. Journ. 651).

(*m*) *Moss v. Gullimore*, 1779, 1 Doug. 279.

(*n*) *Trent v. Hunt*, 1853, 9 Ex. 14.

(*o*) *Tennant v. Field*, 1857, 8 E. & B. 336.

(*p*) *Walter v. Rumbal*, 1696, 1 Ld. Raym. 53.

(*q*) *Smith v. Goodwin*, 1833, 4 B. & Ad. 413.

(*r*) *Hatch v. Hale*, 1850, 15 Q. B. 10. See *Pilkington v. Hastings*, 1601, Cro. Eliz. 813; *Browne v. Powell*, 1827, 4 Bing. 230.

(*s*) *Vertue v. Beasley*, 1831, 1 Moo. & R. 21; *Erans v. Elliott*, 1836, 5 A. & E. 142; *Holland v. Bird*, 1833, 10 Bing. 15; *Loring v. Warburton*, 1858, E. B. & E. 507.

(*t*) *Boulton v. Reynolds*, 1859, 2 E. & E. 369.

(*u*) *Hatch v. Hale*, *supra*; *Boulton v. Reynolds*, *supra*.

(*x*) *Burrell v. Jones*, 1819, 3 B. & A. 47; Cordery on Solicitors, 3rd ed. p. 150.

determined (*y*). But since the statute 2 Will. & M. sess. 1, c. 5, in giving the right of sale, at the same time gave the tenant a period of five days' grace, it has been held upon the equity of the statute that during these five (*yy*) days the tenant may make a tender of the rent and expenses, and so stop the sale; and this right is not prevented by the impounding of the goods (*z*). Now that the goods can be impounded on the premises, the distraining and the impounding are usually very nearly, if not quite, concurrent (*a*).

It appears that a landlord who, after accepting a tender, still remains in possession of the goods, is not liable in trespass (*b*), unless he actually interferes with them, as by removing them from the premises (*c*). But if he refuses to deliver up the goods to the tenant, he will be liable in trover for the conversion (*b*).

When a lodger has served the declaration and inventory required by 34 & 35 Vict. c. 79 (*d*), s. 1, a tender by him to the superior landlord or his bailiff of the rent due to the lodger's immediate landlord, at any time before the goods distrained have been actually sold (*e*), will render any further proceedings in the distress as to the lodger's goods illegal (*f*).

Tender by
lodger.

In the case of a distress upon a holding to which the Agricultural Holdings Act, 1883, applies (*g*), a tender by the owner of live stock taken in by the tenant to agist, at any time before such live stock is sold under the distress, of the price agreed to be paid for the feeding, or of the amount of such price remaining unpaid to the tenant, will render any further proceedings in the distress as regards such live stock illegal (*h*).

Tender by
owner of
agisted cattle.

(*y*) *Six Carpenters' Case*, 1611, 8 Rep. p. 147. See *Ladd v. Thomas*, 1840, 12 A. & E. 117; *Tenant v. Field*, 1857, 8 E. & B. 336; *Thomas v. Harries*, 1840, 1 M. & Gr. 695. (*yy*) Now fifteen; *infra*, p. 276.

(*z*) *Johnson v. Upham*, 1859, 2 E. & E. 250; overruling *Ellis v. Taylor*, 1841, 8 M. & W. 415.

(*a*) *Johnson v. Upham*, *supra*.

(*b*) *West v. Nibbs*, 1847, 4 C. B. 172.

(*c*) *Vertue v. Beasley*, 1831, 1 Moo. & R. 21.

(*d*) The Lodgers' Goods Protection Act, 1871, *supra*, p. 241.

(*e*) Or before the date at which they could be lawfully sold: *Sharp v. Fowle*, 1884, 12 Q. B. D. 385.

(*f*) As to the remedy of the lodger against the superior landlord, see *supra*, p. 242.

(*g*) 46 & 47 Vict. c. 61, s. 54; *infra*, p. 502.

(*h*) *Ib.* s. 45; *supra*, p. 240.

Tender
must be
unconditional.

In order to constitute a legal tender it is necessary that the sum actually due for rent and expenses of the distress should be unconditionally offered to the landlord (*i*), and the tenant cannot require the landlord to admit that no more is due than the amount of the tender (*k*). But the tenant need not himself admit that the sum tendered is due, and a tender is good though made under protest (*l*). Where the tenant in making the tender said, "Here is your quarter's rent," it was held that this did not require the landlord to make any admission of the amount due as a condition of receiving the money, and hence the tender was good (*m*).

In the case of growing crops a tender may, under the Distress for Rent Act, 1737, be made at any time before the crops are cut:—

Tender on
distress of
growing
crops.

11 Geo. 2.
c. 19, s. 9.

If after any distress for arrears of rent taken of corn, grass, hops, roots, fruits, pulse or other product which shall be growing, and at any time before the same shall be ripe and cut, cured or gathered, the tenant, his executors, administrators or assigns, shall pay or cause to be paid to the landlord, or to the steward or other person usually employed to receive the rent of such landlord, the whole rent which shall be then in arrear, together with the full costs and charges of making such distress, then upon such payment or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same shall cease, and the corn, &c., so distrained shall be delivered up to the tenant, his executors, administrators or assigns.

On payment
or tender of
rent and costs
before crops
are cut,
distress to
cease.

Appraisement
abolished
save where,
expressly
called for.

So much of the statute 2 Will. & M. sess. 1, c. 5, as requires appraisement before sale of the goods distrained is repealed (*n*), except in cases where the tenant or owner of the goods and chattels by writing requires such appraisement to be made, and the landlord may, except as aforesaid, sell the goods and chattels distrained without causing them

(*i*) See *Finch v. Miller*, 1848, 5 C. B. 428.

(*k*) *Bowen v. Owen*, 1847, 11 Q. B. 130.

(*l*) *Manning v. Lunn*, 1845, 2 C. & K. 13. Cf. *Greenwood v. Sutcliffe*, 1892, 1 Ch. 1.

(*m*) *Jones v. Bridgman*, 1879, 39 L. T. 500; overruling *M. of Hastings v. Thorley*, 1838, 8 C. & P. 573.

(*n*) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 5.

to be previously appraised. The costs and expenses of appraisement, when required by the tenant or owner, are to be borne and paid by him.

Appraisement, therefore, now takes place only when the tenant or owner of the chattels makes a requisition for it in writing. The appraisers need not be sworn, but two appraisers are necessary, even though the rent distrained for does not exceed 20*l.* (*o*).

The appraisers must be reasonably competent, but need not be professional appraisers (*p*). The landlord or his bailiff must not appraise the goods (*q*), and a sale is irregular if an appraiser has acted as an agent for the landlord in the distress (*r*). The appraisement of growing crops distrained under the Distress for Rent Act, 1737 (*rr*), s. 8, must not be taken before the crops are cut and gathered (*s*).

Having valued the goods, the appraisers usually indorse on a copy of the inventory a memorandum of their appraisement, which must be duly stamped (*t*). The duty on appraisements (*u*) is as follows:—

Where the amount of the appraisement does not exceed 5 <i>l.</i>				£	s.	d.
				0	0	3
Where the amount of the appraisement—						
Exceeds 5 <i>l.</i> and does not exceed 10 <i>l.</i>				0	0	6
"	10	"	"	20	0	1 0
"	20	"	"	30	0	1 6
"	30	"	"	40	0	2 0
"	40	"	"	50	0	2 6
"	50	"	"	100	0	5 0
"	100	"	"	200	0	10 0
"	200	"	"	500	0	15 0
"	500	.	.	.	1	0 0

(*o*) *Allen v. Flicker*, 1839, 10 A. & E. 640 : overruling *Fletcher v. Saunders*, 1834, 1 Moo. & Rob. 375 ; cf. 57 Geo. 3, c. 93, Schedule.

(*p*) *Roden v. Eyton*, 1848, 6 C. B. 427.

(*q*) *Andrews v. Russell*, 1786, Bull. N. P. 81 d ; *Westwood v. Cowne* 1816, 1 Stark. 172 ; *Lyon v. Weldon*, 1824, 2 Bing. 334.

(*r*) *Rocke v. Hills*, 1887, 3 T. L. R. 298.

(*rr*) 11 Geo. 2, c. 19.

(*s*) See *supra*, p. 266.

(*t*) *Form of Appraisement to be indorsed on Inventory.*

We, the undersigned G. H. and J. K., according to the best of our understandings, having viewed the goods and chattels specified in the within-written inventory, do appraise the same at the sum of — pounds.

As witness our hands this — day of —, 18—.

G. H.

J. K.

(*u*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 24 ; Schedule.

(g) SALE UNDER THE DISTRESS.

Time for
replevy.

Under the statute 2 Will. & M. sess. 1, c. 5, the person distraining must allow the tenant or owner of the goods five days after the distress is taken wherein he may either tender the rent and costs of distress or replevy the goods, and on the expiration of this period he may proceed to sell (*x*). The tenant's right to replevy continues up to the time of sale, and is not stopped by removal or appraisal (*y*). It has been held that the tenant is entitled to five clear days—that is, five times twenty-four hours—and where the distress was taken on Friday at 2 p.m. a sale at 11 in the morning of the following Wednesday was wrong (*z*). But the correct mode of reckoning is to exclude altogether the day of seizure, and then allow five more clear days (*a*); so that in the case just mentioned the sale should have been postponed till the Thursday.

Extension to
fifteen days.

The Law of Distress Amendment Act, 1888, by sect. 6, provides as follows for the extension of the period of five days to fifteen on the written request of the tenant:—

51 & 52 V. c. t.
c. 21, s. 6.

The period of five days provided in the statute 2 Will. & M. sess. 1, c. 5, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of not more than fifteen days if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress (*c*), and also give security for any additional cost that may be occasioned by such extension of time: provided that the

(*x*) The county court register should be searched to see that the goods have not been replevied.

(*y*) *Jacob v. King*, 1814, 5 Taunt. 451.

(*z*) *Harper v. Taswell*, 1833, 6 C. & P. 166.

(*a*) *Robinson v. Waddington*, 1849, 13 Q. B. 753.

(*c*) The following is a form of request:—

To Mr. A. B. [*landlord or person levying the distress*].

I hereby request you to extend the period within which I may replevy the goods and chattels which you have distrained at the — Farm, in the parish of —, in the county of —, to a period of [*specify the number of days, not exceeding fifteen days*]. And I hereby give you notice that I propose as sureties for any additional costs that may be occasioned by such extension of time Mr. C. D., of —, in the county of —, farmer, and Mr. E. F., of —, in the county of —, gentleman.

Dated the — day of —, 18—.

G. H. [*tenant or owner of the goods distrained*].

landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid.

If the goods are not sold for the best price, the tenant may bring an action against the landlord, and go into evidence to show, for instance, that they were allowed to stand in the rain, and were improperly lotted (*d*); but goods sold at the appraised value are presumed to have been sold for the best price (*e*). It seems that there is no order required by law to be observed in the sale of goods under a distress. If the landlord distrains, among other goods, his tenant's cattle and beasts of the plough (*f*), he is not bound to sell the other goods first; and although it turns out after the sale (judging by the result) that there would have been sufficient to satisfy the rent and expenses without selling the cattle, the distress is not thereby proved to be illegal, if there was ground for supposing, from the appraisal of competent persons, made at the time of the seizure, that, without taking the cattle, the amount of the rent and expenses would not be realized (*g*). Where the goods of a lodger are distrained together with the goods of the tenant, and are sold first, after notice from the lodger, and the tenant's goods turn out to be sufficient to satisfy the rent and charges, the lodger is entitled to sue for an excessive distress (*h*).

Price.

Order of sale.

A landlord cannot impose on the sale of goods under a distress any conditions which must necessarily prevent the goods from being sold at the best price which can be got (*i*). Hence a landlord who has distrained hay and straw prohibited by covenant from being carried off the premises will render himself liable to an action for not selling at the best price, if he sells such distress subject to a condition that the purchaser shall consume it on the premises, by

Sale must not be subject to condition.

(*d*) *Poynter v. Buckley*, 1833, 5 C. & P. 512.

(*e*) *Walter v. Rumball*, 1696, 1 Ld. Raym. at p. 55.

(*f*) See *supra*, p. 240.

(*g*) *Jenner v. Yolland*, 1818, 6 Price, 3.

(*h*) *Wilkinson v. Ibbett*, 1860, 2 F. & F. 300; and as to lodgers' goods, see *supra*, p. 241.

(*i*) *Hawkins v. Walrod*, 1876, 1 C. P. D. 280, p. 282.

reason whereof it produces less than the usual price (*k*). The Sale of Farming Stock Act, 1816 (*l*), prohibiting in various cases the sale of crops in any other manner than the tenant could have sold them, does not apply to the sale by a landlord of a distress (*m*).

Entry by
purchaser.

A licence is not implied by law to the purchaser of goods under a distress to enter upon the tenant's premises and take them away, though they may have remained there with the tenant's consent (*n*). But it has been held that where by the conditions of sale of goods under a distress, to which conditions the tenant was a party, the buyer was to be allowed to enter and take the goods, the tenant could not, after the sale, revoke the licence (*o*).

Where sale
may be made.

The Law of Distress Amendment Act, 1888 (*p*), provides, by sect. 5, that for the purposes of sale the goods and chattels distrained shall, at the request in writing of the tenant or owner of such goods and chattels (*q*), be removed to a public auction room or to some other fit and proper place specified in such request, and be there sold. The costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, are to be borne and paid by the person requesting the removal.

Subject to the above enactment, the sale may, in general, be made either upon the demised premises, if the goods are impounded there, or at any other place. But corn, grain or hay (*r*) must not be "removed by the person or persons distraining, to the damage of the owner thereof, out of the

Stat. 2 Will. &
M. sess. 1, c. 5.
s. 2.

(*k*) *Harkins v. Walrond*, 1876, 1 C. P. D. 280; *Ridgway v. Stafford*, 1851, 6 Ex. 404; *Jones v. Hamp*, 1840, cited in 10 M. & W. 710. See *Roden v. Eytton*, 1848, 6 C. B. 427; *Frusher v. Lee*, 1842, 10 M. & W. 709. *Abbey v. Petch*, 1841, 8 M. & W. 419, *contra*, is overruled.

(*l*) 56 Geo. 3, c. 50; *infra*, p. 350. (*m*) *Harkins v. Walrond*, *supra*.

(*n*) *Williams v. Morris*, 1841, 8 M. & W. 488. But a statutory right exists under 11 Geo. 2, c. 19, s. 10, *supra*, p. 264.

(*o*) *Wood v. Marley*, 1839, 11 A. & E. 34. But see 8 M. & W. p. 493.

(*p*) 51 & 52 Vict. c. 21.

(*q*) The following is a form of request:—

To Mr. A. B. [*landlord or person levying the distress*].

I hereby request you to remove the goods and chattels distrained by you at the — Farm, in the parish of —, in the county of —, to a public auction room [*or, if desired, specify some fit and proper place*] for the purposes of sale.

Dated the — day of —, 18—.

C. D. [*tenant or owner of the goods distrained*]

(*r*) See *supra*, p. 265.

place where the same shall be found and seized, but be kept there, as impounded, until the same shall be replevied or sold.” Corn, &c., not to be removed.

Until the goods distrained are sold, the property in them remains in the tenant (*s*), subject to the right of the landlord to detain or sell them. It has been said that the person distraining does not acquire even the possession of the cattle or things distrained, since they are in the custody of the law (*t*). But though this may be doubted, the right of possession according to the ordinary rule attaches to the right of property, and if the landlord loses control of the goods and does not forthwith recapture them, the real owner may maintain trover for them (*u*). Property in goods distrained.

Where the goods distrained are of small value, the appraisers sometimes take them at their own valuation, a receipt written at the foot of the inventory being considered a sufficient discharge (*x*). But this practice is so obviously unjust to the tenant that it should not be adopted in any case where the goods can be profitably disposed of by public auction. The *landlord* must not take the goods at the appraised value. If he does, the transaction will not be considered as a sale, and the property in the goods will not be divested from the tenant or owner (*y*); unless they belong to the tenant, and are so taken with his consent (*z*). To whom sale may be made.

The sale cannot be made before the expiration of five clear days of the seizure, or of the extended period of fifteen days under sect. 6 of the Law of Distress Amendment Act, 1888 (*a*). If it is made before the expiration of whichever period is applicable, *and actual damage is thereby occasioned to the tenant*, he may maintain an action against the landlord (*b*); but the tenant is not entitled to a verdict unless he proves actual damage (*b*). It is lawful for the When sale may be made.

(*s*) *King v. England*, 1864, 4 B. & S. 782; *Turner v. Ford*, 1846, 15 M. & W. 212; *Tredale v. Kendall*, 1878, 40 L. T. 362. See *Moore v. Pyper*, 1809, 11 East, 52.

(*t*) *R. v. Cotton*, 1751, Parker, at p. 121.

(*u*) *Turner v. Ford*, 1846, 15 M. & W. 212.

(*x*) Cf. Bullen on Distress, 2nd ed. 193.

(*y*) *King v. England*, 1864, 4 B. & S. 782.

(*z*) See judgment of Blackburn, J., 4 B. & S. p. 986. (*a*) *Supra*, p. 276.

(*b*) *Lucas v. Turlerton*, 1858, 3 H. & N. 116; *Rodgers v. Parker*, 1856, 18 C. B. 112; *infra*, p. 291.

landlord, and those acting under him, to remain more than the five days or fifteen days on the premises for the purpose of selling the goods distrained (*c*). If, however, the sale is not made, or the goods are not removed from the premises, within a reasonable time (*c*) after the expiration of the five or fifteen days, the landlord will be liable to an action of trespass by the tenant (*d*), at any rate, if he removes the goods after that time (*c*). It must be left to the jury to say what is a reasonable time; in one case, where the distress was made on April 14th, and the sale on April 27th, the jury found that the sale was made within a reasonable time (*c*). A lodger may maintain this action against the superior landlord (*f*).

Postponement
of sale.

The sale is often postponed at the request of the tenant (*g*), from whom the landlord should invariably obtain a written consent to his remaining on the premises (*h*). But a payment of broker's charges to postpone the sale is not voluntary, and, if they are irregular, an action will lie to recover the amount (*i*). The tenant does not by making an arrangement as to the sale waive his right of action for an excessive distress (*k*). An undertaking for the continuance of the distress if the landlord consents not to sell does not require a stamp (*l*). The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did

(*c*) *Pitt v. Shew*, 1821, 4 B. & A. 208.

(*d*) *Griffin v. Scott*, 1727, 2 Ld. Raym. 1424.

(*e*) *Winterbourne v. Morgan*, 1809, 11 East, 395.

(*f*) *Sharp v. Fowle*, 1884, 12 Q. B. D. 385.

(*g*) See *Harrison v. Barry*, 1819, 7 Price, 690; *Fisher v. Algar*, 1826, 2 C. & P. 374.

(*h*) *Form of Consent*.

To [Mr. A. B., bailiff of] Mr. E. F.

I hereby consent that you shall remain in possession of the goods and chattels which you have distrained for rent upon the premises in my occupation, and shall keep the said goods and chattels in the place where they are now impounded for the space of — days from the date hereof, in order to enable me to discharge the said rent and costs of the distress. And I hereby agree that the expenses of keeping possession of the said goods and chattels for the space aforesaid shall be deemed to be part of the charges of the said distress, and shall be recoverable as such. Witness my hand this — day of —, 18—.

C. D.

(*i*) *Hills v. Street*, 1828, 5 Bing. 37.

(*k*) *Willoughby v. Backhouse*, 1824, 2 B. & C. 821.

(*l*) *Fishwick v. Milnes*, 1850, 4 Ex. 825.

not know which were the goods of the lodger and which were those of the tenant (*m*).

Standing corn and growing crops cannot legally be sold until they are ripe (*n*), and until they are ripe the tenant may tender the rent. And though they are meant to be included in a sale, there is in fact no sale, and, so far as this goes, no cause of action (*o*). Hence, if no damage has been sustained by the premature sale, the tenant cannot recover even nominal damages (*p*).

Growing
crops.

Under the stat. 2 Will. & M. sess. 1, c. 5, s. 2. the surplus proceeds of sale, if any—that is, what remained after payment of the rent and the reasonable charges of the distress (*q*)—were to be left in the hands of the sheriff, under-sheriff, or constable assisting at the sale, for the owner's use. If the surplus was not left in the hands of the officer, the remedy of the tenant was not for money had and received, but by an action on the case for not dealing with the surplus according to the statute (*r*). Now that the assistance of the above officers is no longer necessary (*s*), the proper course is for the distrainor to pay the surplus proceeds to the tenant direct. If the goods have been removed, any surplus unsold should be returned to the premises from which they were taken (*t*).

Surplus
proceeds of
sale.

A sham distress to defraud an execution creditor is good as between landlord and tenant, and the tenant cannot recover the proceeds of sale (*u*).

(h) COSTS OF DISTRESS.

By stat. 57 Geo. 3, c. 93 (*r*), s. 1, the costs of distresses under 20*l*. were limited to the scale contained in the schedule to the Act; and by sect. 2, in the case of excessive charges being made, the party aggrieved could obtain from a justice of the peace an order for payment of treble the

Fees under
Distress for
Rent Rules,
1888.

(*m*) *Fisher v. Algar*, 1826, 2 C. & P. 374.

(*n*) 11 Geo. 2, c. 19, s. 8; *supra*, p. 266.

(*o*) *Owen v. Legh*, 1820, 3 B. & A. 470.

(*p*) *Rodgers v. Parker*, 1856, 18 C. B. 112. See *Proudlow v. Twenlow*, 1833, 1 Cr. & M. 326, as explained in *Rodgers v. Parker*.

(*q*) *Lyon v. Tomkies*, 1836, 1 M. & W. 603.

(*r*) *Yates v. Eastwood*, 1851, 6 Ex. 805. (*s*) *Supra*, p. 270, note (*d*).

(*t*) *Evans v. Wright*, 1857, 2 H. & N. 527.

(*u*) *Sims v. Tuffs*, 1834, 6 C. & P. 207.

(*v*) The Distress (Costs) Act, 1817.

amount of the moneys unlawfully taken, together with full costs. These enactments, though not repealed, are practically superseded by the table of fees, charges, and expenses appended to the Distress for Rent Rules, 1888 (*x*). Every bailiff levying a distress is bound, on the request of the tenant, to produce to him his certificate and a copy of his charges. A landlord who does not personally interfere in the distress is not liable for a breach of this requirement (*y*). The charge authorized by 1 & 2 Ph. & M. c. 12, s. 2, for keeping the chattels distrained in a public pound (*z*), could not now, it seems, be added to the charges in the table.

(i) REMEDIES FOR ILLEGAL DISTRESSES.

Instances of
illegal
distress.

A distress is *illegal* in the following cases:—Where no rent for which a distress can be made is due and in arrear (*a*); where no tenancy exists between the owner of the goods and the person distraining (*b*); where a valid tender of the rent due has been made before seizure (*c*); where the distress is made before sunrise or after sunset (*d*); where an unlawful entry is made (*e*); where goods are seized which are privileged from distress (*f*), or which are not upon the demised premises (*g*); where a second distress is vexatiously made for rent previously distrained for (*h*). The remedies for an illegal distress are by (1) rescue; (2) replevin; and (3) action.

(*x*) The percentage “for levying distress” goes to the bailiff: *Phillipps v. Rees*, 1889, 24 Q. B. D. 17. The charge for “man in possession” can only be made where the actual possession continues; it is not justified by “walking possession”: *Lumsden v. Burnett*, 1898, 2 Q. B. 177; *Duncombe v. Hicks* (referred to, 42 Sol. Journ. p. 393). It is improper to incur the expense of a man in possession where growing crops are distrained; it is sufficient to put up a public notice: *Ex parte Arnison*, 1868, L. R. 3 Ex. 56. If the rent is paid and the landlord withdraws, the bailiff cannot sell to raise money for his fees: *Harding v. Hall*, 1866, 14 L. T. 410.

(*y*) See *Hart v. Leach*, 1836, 1 M. & W. 560, decided on 57 Geo. 3, c. 93.

(*z*) See *Child v. Chamberlain*, 1834, 5 B. & Ad. p. 1051.

(*a*) See *Lockier v. Paterson*, 1844, 1 C. & K. 271; *supra*, pp. 219, 222; *infra*, p. 288.

(*b*) *Supra*, p. 222. See *Yates v. Tearle*, 1844, 6 Q. B. 282.

(*c*) *Supra*, p. 257. A tender of rent and expenses after seizure, but before impounding, renders the subsequent detention of the goods illegal: *supra*, p. 272.

(*d*) *Supra*, p. 251.

(*e*) *Attack v. Bramrell*, 1863, 3 B. & S. 520; *supra*, p. 257.

(*f*) *Supra*, pp. 230—243. (*g*) *Supra*, p. 243. (*h*) *Supra*, p. 262.

Rescue.

In the above cases the tenant may lawfully rescue the goods, or take them out of the hands of the person distraining, at any time before they are impounded (*i*), provided this can be done without occasioning a breach of the peace. Rescue.

Replevin.

The tenant may obtain restitution of goods wrongfully taken out of his possession under an *illegal* distress by suing out a replevin, which he may do at any time before the goods distrained are sold, although they may have been removed from the demised premises or appraised (*k*) ; and replevin also lies for detaining the goods after tender and before impounding (*l*). Replevin.

Replevin is a procedure in which the owner of the goods upon application, formerly to the sheriff, and now to the bailiff of the county court in the district of which the distress was taken, and upon finding sufficient security for the alleged rent and the costs, obtains redelivery of the goods, and then tries the right of the landlord to distrain in an action (*m*). The term "replevin" is applied both to the redelivery of the goods and to the action in which the right is tried.

The procedure is applicable only when the distress is altogether wrongful, as where no rent whatever is due, or where all arrears had been sufficiently tendered beforehand. If anything is in arrear, so that the distress is not wholly tortious, and the injury is an excessive seizure or some irregularity in the distress, the remedy is by an action and not by replevin (*n*). Moreover, replevin lies only for what may by law be distrained (*o*), and it is not applicable, For replevin distress must be wrongful.

(*i*) Per Bramwell, B., 1859, in *Keen v. Priest*, 4 H. & N. at p. 240. See Co. Litt. 160 b ; *Beril's Case*, 1583, 4 Rep. p. 11 b ; *Cotsworth v. Betison*, 1697, 1 Ld. Raym. 104.

(*k*) *Jacob v. King*, 1814, 5 Taunt. 451.

(*l*) *Frans v. Elliott*, 1836, 5 A. & E. 142.

(*m*) See Bullen on Distress, p. 277 ; Co. Litt. 145 b ; and as to nature of replevin, see judgment of Coleridge, J., in *Mennie v. Blake*, 1856, 6 E. & B. 842 ; and of Bovill, C.J., in *Gibbs v. Cruikshank*, 1873, L. R. 8 C. P. 454.

(*n*) Bullen on Distress, 278.

(*o*) Bac. Abr. "Replevin" (F.).

therefore, to cases where fixtures, deeds, or animals *ferre naturæ* are distrained (*p*). To prevent a sale of goods under a distress the notice of replevin should be regular and be properly served (*q*).

Action of
replevin.

Replevin is a personal action (*r*), founded upon the right of property. It has been said that a possessory right in the plaintiff will not support the action (*s*). But special property, such as that of a bailee, is sufficient (*t*), and either the bailor or the bailee may sue (*t*). Since replevin affirms the right of property, it may be brought by the executors of the tenant on whose goods the distress was made (*u*). Apparently the plaintiff cannot put in issue both the fact of the tenancy and of rent being in arrear, and the authority of the actual distrainor to distrain as bailiff (*x*). A plea of a former distress for the same rent without adding that the rent was satisfied, is bad (*y*).

Damages.

If the chattels distrained have been delivered to the plaintiff on the replevin, as is the usual practice, the damages recoverable by him are generally confined to the expenses of the replevin bond (*z*). But, in addition, the plaintiff is entitled to recover any special damage which he has suffered in consequence of the wrongful taking (*a*), including damages for annoyance and injury to credit (*b*); and after judgment in replevin, whether special damage is recovered or no, he is precluded from bringing an action of trespass to the goods, though not from bringing an action for trespass to the land (*c*).

Proceedings
in replevin.

Formerly, as already observed, the security was given to the sheriff, but now the powers and responsibilities of the sheriff with respect to replevin bonds and replevins have

(*p*) *Niblet v. Smith*, 1792, 4 T. R. 504; *Darby v. Harris*, 1841, 10 L. J. Q. B. at p. 295. (*q*) See *Cuckson v. Winter*, 1828, 2 M. & Ry. 313.

(*r*) *Eaton v. Southby*, 1738, Willes, p. 134.

(*s*) *Templeman v. Case*, 1712, 10 Mod. 24.

(*t*) Bac. Abr. "Replevin" (F.).

(*u*) *Arundell v. Trevill*, 1662, 1 Sid. 81.

(*x*) *Trent v. Hunt*, 1853, 9 Ex. 14.

(*y*) *Hudd v. Ravenor*, 1821, 2 Br. & B. 662; *supra*, p. 263.

(*z*) Roscoe's Evidence, 16th ed. 1079.

(*a*) *Gibbs v. Cruikshank*, 1873, L. R. 8 C. P. 454.

(*b*) *Smith v. Enright*, 1893, 63 L. J. Q. B. 220.

(*c*) *Gibbs v. Cruikshank*, *supra*. Cf. *Phillips v. Berryman*, 1783, 3 Dougl. 286; 1 Selw. N. P. 679. See *Pease v. Chaytor*, 1861, 1 B. & S. 658; 3 B. & S. 620.

been abolished (*d*), and the procedure is regulated by the County Courts Act, 1888 (*e*). Under sect. 134 the registrar of the county court of the district in which the goods subject to replevin are taken is empowered to approve replevin bonds, and to grant replevin on proper security being given.

If the replevisor wishes to commence proceedings in the High Court, the condition of the bond (*f*) is that he shall commence an action of replevin against the seisor within one week from the date of the bond, and prosecute the same "with effect and without delay," and, unless judgment be obtained by default, shall prove before the High Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, the rent or value of which exceeded 20*l.* a year, or to some toll, market, fair, or franchise, was in question, or that the rent or the value of the goods seized exceeded 20*l.*, and that he will return the goods, if a return is adjudged (*g*).

Action in
High Court.

If the replevisor wishes to commence proceedings in the county court, the condition of the bond is that he shall commence an action of replevin in the county court within one month, and prosecute the action "with effect and without delay," and make return of the goods, if a return is adjudged (*h*). The county court can try replevin though title is in question (*i*).

Action in
county court.

The bond may be secured by sureties or by deposit in court (*k*). The amount must be sufficient to cover the alleged rent and the probable costs in the High Court or the county court, as the case may be (*l*). The amount recoverable on the bond is the rent in arrear at the time of distress and costs (*ll*); but in any case not exceeding the penalty in the bond and costs (*m*). A distress on the

Replevin
bond.

(*d*) See 11 Geo. 2, c. 19, s. 23. As to the old proceedings in replevin, see Bullen on Distress, 1st ed., pp. 245—249. (*e*) 51 & 52 Vict. c. 43.

(*f*) For form of bond see Form 244 in County Court Rules, 1889. It is doubtful whether the bond, if given in England, is liable to stamp duty. The exemption of replevin bonds in the Stamp Act, 1870, was general. In the Act of 1891 it applies only to bonds given in Ireland.

(*g*) County Courts Act, 1888, s. 135. (*h*) Sect. 136.

(*i*) *Reg v. Raines*, 1853, 1 E. & B. 855; *Fordham v. Akers*, 1863, 4 B. & S. 578. (*k*) Sects. 108, 109. (*l*) Sects. 135, 136.

(*ll*) *Ward v. Henley*, 1825, 1 Y. & J. 285.

(*m*) *Hefford v. Alger*, 1808, 1 Taunt. 218; *Branscombe v. Scarbrough*, 1844, 6 Q. B. 13. See *Dix v. Groom*, 1880, 5 Ex. D. 91.

same goods for subsequent rent does not discharge the sureties (*mm*).

Condition of
replevin bond.

The action is not prosecuted with effect unless the party on whose behalf the security is given is successful (*m*); or, as it has been more cautiously put, carries it to a not unsuccessful termination (*n*). But if the action is stopped by the death of the plaintiff, it is enough that it has till then been carried regularly forward (*o*). The condition that the action shall be prosecuted without delay (*p*) may be broken by a delay which does not exceed the time allowed by the ordinary practice of the Court, if the defendant is thereby unduly prejudiced (*q*); but the plaintiff is not responsible for delay occasioned by the default of the officers of the Court (*r*). A plaintiff who does not use due diligence in prosecuting the action commits a breach of the condition even though the action is not determined (*s*). The bond may be enforced although the statutory preliminaries have not been strictly complied with (*t*).

Sureties.

Where a person proposes to give a bond by way of security he must serve, by post or otherwise, on the opposite party, and upon the registrar at his office, notice of the proposed sureties according to the prescribed form, and the registrar forthwith gives notice to both parties of the date on which he proposes that the bond shall be executed. He states in the notice (*u*) to the obligee that any valid objection which he has to make to the sureties or either of them must be made on such date (*x*). The sureties must make an affidavit of their sufficiency according to the prescribed form, unless the opposite party dispenses with such affidavit (*y*). Thus the onus of objecting to the sureties is thrown upon the obligee, and in any case the registrar's

(*mm*) *Hefford v. Alger*, *supra*.

(*m*) *Morgan v. Griffith*, 1741, 7 Mod. 380; *Perreau v. Bevan*, 1826, 5 B. & C. 284; *Tunncliffe v. Wilmot*, 1848, 2 C. & K. 626.

(*n*) *Jackson v. Hanson*, 1841, 8 M. & W. 477.

(*o*) *Morris v. Matthews*, 1841, 2 Q. B. 293.

(*p*) See *Axford v. Perrett*, 1828, 4 Bing. 586.

(*q*) *Gent v. Cutts*, 1847, 11 Q. B. 288.

(*r*) *Harrison v. Wardle*, 1833, 5 B. & Ad. 146.

(*s*) *Harrison v. Wardle*, *supra*. As to pleading compliance with the bond, see *Brackenbury v. Pell*, 1810, 12 East, 585.

(*t*) *Stansfeld v. Hellarvell*, 1852, 7 Ex. 373.

(*u*) See form of notice, Form 243 in County Court Rules, 1889.

(*x*) County Court Rules, 1889, Ord. XXIX. r. 1. (*y*) Rule 2.

duty is only to judge of their sufficiency (*z*) on the materials before him. It has been held that he cannot refuse to receive a bond on the ground that the party is by law incapable of executing a valid bond (*a*).

Security having been duly given, the registrar will issue his warrant (*b*) to the bailiff directing him to replevy and deliver the goods and chattels to the replevisor, and the bailiff will execute such warrant accordingly, and make a return to that effect. After goods taken in distress for rent have been replevied, the person distraining has no lien on them at law or in equity, but is left to his remedy on the replevin bond (*c*).

Warrant to replevy.

An action of replevin brought in the county court can be removed into the High Court by writ of *certiorari* (*d*), if the defendant applies to the High Court or to a judge thereof for such writ, and shall give security, to be approved of by a master of the Supreme Court, for such amount, not exceeding 150*l.*, as such master shall think fit, conditioned to defend such action with effect (*e*), and, unless the replevisor shall discontinue or shall not prosecute the action, or shall become nonsuit therein, to prove before the High Court that the defendant had good grounds for believing, either that the title to some corporeal or incorporeal hereditament, the rent or value of which exceeded 20*l.* by the year, or to some toll, market, fair, or franchise, was in question, or that the rent in respect of which the distress shall have been taken, or the value of the goods seized, exceeded 20*l.*

Removal of action to High Court.
County Courts Act, 1888, s. 137.

Any party to an action of replevin in the county court has the ordinary right to appeal to the High Court upon a point of law, or upon the admission or rejection of any evidence, provided that where the amount of rent or the

Appeal from county court.

(*z*) Under the former practice the sheriff did not warrant the sufficiency of the sureties : *Hindle v. Blades*, 1813, 5 Taunt. 225 ; it was enough that they were apparently responsible : *Hindle v. Blades*; *Scott v. Waithman*, 1822, 3 Stark. 168. See *Jeffery v. Bastard*, 1836, 4 A. & E. 823 ; *Plumer v. Brisco*, 1847, 11 Q. B. 46.

(*a*) *Young v. Brompton Waterworks Co.*, 1861, 1 B. & S. 675.

(*b*) For form of warrant, see Form 246 in County Court Rules, 1889.

(*c*) *Bradyll v. Ball*, 1784, 1 Bro. C. C. 427.

(*d*) Application should be made to a judge at chambers. Archbold's County Court Practice, 10th ed. 146 ; note to s. 126 of Act of 1888.

(*e*) As under sect 135, this condition is not fulfilled unless the defendant succeeds : *Tummons v. Oyle*, 1856, 6 E. & B. 571.

value of the goods seized does not exceed 20*l.*, there is no appeal unless the judge of the county court shall think it reasonable that such appeal should be allowed, and shall grant leave to appeal (*f*). Where the right of appeal is disputed on the ground that the goods do not exceed 20*l.* in value, there should be an appraisement with an affidavit of value (*g*).

New trial.

In replevin, where the verdict is for the plaintiff, the Court will not grant a new trial even on payment of costs without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties and make the plaintiff incur the risk of double costs (*h*). But a new trial is not refused merely on the ground that the sum recovered is under 20*l.* (*i*).

Action for Illegal Distress.

Remedy for distress where no rent is due.

For the case of distress where no rent is due to the distrainor, a remedy by action is given by 2 Will. & M. sess. 1, c. 5, s. 5:—

Owner may recover double value of goods sold.

If a distress and sale “shall be made for rent pretended to be in arrear and due, where no rent is in arrear or due to the person distraining or to him in whose name or right such distress shall be taken, then the owner of such goods or chattels distrained and sold, his executors or administrators, may, by action of trespass, or upon the case, to be brought against the person so distraining, his executors or administrators, recover double the value (*k*) of the goods or chattels so distrained and sold, together with full costs of suit (*l*).”

Remedy in other cases of illegal distress.

In other cases of illegal distress for rent the tenant may, by action, recover from the person on whose behalf the distress is made the full value of the goods and chattels distrained, without deducting the arrears of rent (*m*), unless there are circumstances of mitigation which the jury ought

(*f*) County Courts Act, 1888, s. 120.

(*g*) *Smith v. Enright*, 1893, 63 L. J. Q. B. 220, per Wright, J.

(*h*) *Parry v. Duncan*, 1831, 7 Bing. 243.

(*i*) *Edgson v. Cardwell*, 1873, L. R. 8 C. P. 647.

(*k*) *Masters v. Farris*, 1845, 1 C. B. 715.

(*l*) But this means no more than the ordinary costs as between party and party: see *Avery v. Wood*, 1891, 3 Ch. 115, on the same term in 5 & 6 Vict. c. 45 (The Copyright Act, 1842), s. 26.

(*m*) *Keen v. Priest*, 1859, 4 H. & N. 236; *Attack v. Bramwell*, 1863, 3 B. & S. 520. See *Edmondson v. Nuttall*, 1864, 17 C. B. N. S. 280.

to take into consideration (*n*). The fact that the tenant has had part satisfaction by the return of the goods may be used in mitigation of damages (*n*).

Where goods are privileged from distress, such as goods deposited with a pawnbroker in the way of trade (*o*), trover lies for them (*p*), and the measure of damages is the value of the goods, and not merely of the plaintiff's interest therein (*q*). But the owner can recover only the damage caused by taking the goods actually privileged (*r*).

Distress on privileged goods.

If, after an action for illegal distress has been brought, the landlord returns the goods distrained, the plaintiff may give evidence to show their damaged condition (*s*).

Summary Statutory Remedies.

By the Law of Distress Amendment Act, 1895 (*t*), s. 4, it is provided that a court of summary jurisdiction, on complaint that goods or chattels exempt under sect. 4 of the Act from distress for rent have been taken 'under such distress, may, by summary order, direct that the goods and chattels so taken, if not sold, be restored; or, if they have been sold, that such sum as the court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied.

Distress on goods exempt under 58 & 59 Vict. c. 24.

In cases of unlawful or irregular distress within the metropolitan police district (*tt*), where the tenancy is by the week or month, or the rent does not exceed 15*l.* a year, a summary remedy on complaint to a police magistrate is given by 2 & 3 Vict. c. 71 (*u*), s. 39.

Distress in Metropolitan Police District.

With respect to holdings to which the Agricultural Holdings Act, 1883, applies (*v*), it is provided (*x*) that, where any dispute arises (i.) in respect of any distress having been levied contrary to the provisions of the Act; or (ii.) as to the ownership of any live stock distrained, or as to the price to be paid for feeding such stock; or (iii.) as

Distress on agricultural holdings.

(*n*) Per Willes, J., in *Edmondson v. Nuttall*, 1864, 34 L. J. C. P. at p. 104; *Harvey v. Pocock*, 1843, 11 M. & W. 740. (*o*) *Supra*, p. 231.

(*p*) *Ward v. Ventom*, 1797, Peake, Add. Cas. 126; *Dalton v. Whittam*, 1842, 3 Q. B. 961. See *Shipwick v. Blanchard*, 1795, 6 T. R. 298.

(*q*) *Swire v. Leach*, 1865, 18 C. B. N. S. 479.

(*r*) *Harvey v. Pocock*, *supra*.

(*s*) *McGrath v. Bourne*, 1876, 1r. R. 10 C. L. 160. (*t*) *Supra*, p. 238.

(*tt*) See 10 Geo. 4, c. 44, s. 4. (*u*) The Metrop. Police Courts Act, 1839.

(*v*) *Infra*, p. 502. (*x*) Agric. Hold. Act, 1883, s. 46.

to any other matter or thing relating to a distress on such holding, such dispute may be heard and determined by a county court (*y*) or by a court of summary jurisdiction (*z*); and any such county court or court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires.

(j) REMEDY FOR IRREGULAR DISTRESSES.

Instances of
irregular
distress.

A distress made for rent justly due is *irregular* in the following cases:—Where the goods distrained are sold without a proper notice, or, where appraisement is required (*a*), without a regular appraisement (*b*); or before the expiration of five (or fifteen) days from the notice (*c*); also where, owing to the neglect or improper conduct of the person distraining, the goods distrained are not sold for the best price that can be got for the same (*d*).

Remedy.

In an action grounded upon any such irregularity the distrainor will not be treated as a trespasser *ab initio*, and the tenant can recover only the special damage he has suffered. Provision to this effect is made by the Distress for Rent Act, 1737:—

11 Geo. 2,
c. 19, s. 19.
Distress not to
be rendered
unlawful by
irregularity.
Person
aggrieved
may recover
special
damage only.

Where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or by his agents, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more, in

(*y*) The decision is subject to the ordinary procedure as to appeal: *Hammer v. King*, 1887, 57 L. T. 367.

(*z*) An appeal lies to general or quarter sessions: s. 46.

(*a*) *Supra*, p. 274.

(*b*) *Biggins v. Goode*, 1832, 2 Cr. & J. 364; *Knight v. Egerton*, 1852, 7 Ex. 407. See *Knotts v. Curtis*, 1832, 5 C. & P. 322.

(*c*) See *supra*, p. 279; *Wallace v. King*, 1788, 1 H. Bl. 13; *Lucas v. Tarleton*, 1858, 3 H. & N. 116.

(*d*) *Supra*, p. 277. As to actions for excessive distresses, see *supra*, p. 261.

any action of trespass, or on the case (*e*). Where the plaintiff shall recover in such action, he shall be paid his full costs of suit (*f*).

No tenant shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party distraining, or his agent, before such action brought.

Sect. 20.

Tenant not to recover if tender of amends made before action.

If the plaintiff fails, the defendant recovers his full costs under section 21 (*g*).

Without proof of actual damage, the plaintiff in an action for an irregular distress is not entitled even to a verdict for nominal damages (*h*), though such damage need not be specially alleged (*i*). The measure of damages in the action is the value of the goods (*k*) distrained, after deducting the amount of rent due (*l*). This measure has been applied in an action founded on a sale rendered irregular by the fact that an agent for the landlord in the distress has acted as one of the appraisers (*m*).

Actual damage must be proved.

(ii) *Remedy on Execution against Tenant.*

Although the landlord cannot distrain on goods which have been taken in execution, he is not altogether deprived of remedy in such a case, and under the Landlord and Tenant

(*e*) *I.e.*, it was formerly held trespass if the irregularity was in the nature of trespass; otherwise case: *Meesing v. Kemble*, 1809, 2 Camp. 115; *Winterbourne v. Morgan*, 1809, 11 East, 395. But the distinction is now immaterial. Inasmuch as, by the statute, the distrainer was not a trespasser *ab initio*, and an action on the case was given, trover would not lie against him: *Wallace v. King*, 1788, 1 H. Bl. 13; nor, where any rent was due, would an auctioneer who had received goods improperly distrained, and subsequently returned them, be liable to such an action: *Whitworth v. Smith*, 1832, 5 C. & P. 250. As to pleading to the action, see sect. 21; R. S. C. 1883, Ord. 19, r. 12; *Williams v. Jones*, 1841, 11 A. & E. 643; *Vaughan v. Davies*, 1794, 1 Esp. 257; *Furneaux v. Fotherby*, 1815, 4 Camp. 136; *Postman v. Harrell*, 1833, 6 C. & P. 225.

(*f*) Hence the plaintiff recovers costs in the High Court although the action should have been brought in the county court: *Reeve v. Gibson*, 1891, 1 Q. B. 652.

(*g*) Instead of "double costs" (5 & 6 Vict. c. 97, s. 2), see *Handcock v. Foulkes*, 1842, 9 M. & W. 431.

(*h*) *Rodgers v. Parker*, 1856, 18 C. B. 112; *Lucas v. Tarleton*, 1858, 3 H. & N. 116. But see *supra*, p. 261, notes (*k*), (*l*).

(*i*) *Knotts v. Curtis*, 1832, 5 C. & P. 322.

(*k*) *I.e.*, the fair value to the tenant: *Knotts v. Curtis*, *supra*.

(*l*) *Whitworth v. Maden*, 1847, 2 C. & K. 517; *Biggins v. Goode*, 1832, 2 Cr. & J. 364; *Knight v. Egerton*, 1852, 7 Ex. 407.

(*m*) *Rocke v. Hills*, 1887, 3 T. L. R. 298.

Act, 1709, the goods may not be removed from the demised premises until a year's arrears of rent have been paid :—

8 Anne, c. 14
(*mm*), s. 1.
Goods not to
be removed
under execu-
tion until
one year's
rent is paid to
landlord.

No goods or chattels whatsoever (by whomsoever owned (*n*)), being in or upon any messuage, lands or tenements, which shall be leased for life, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sums of money as shall be due for rent (*o*) for the said premises at the time of the taking such goods or chattels by virtue of such execution: Provided the said arrears of rent do not amount to more than one year's (*p*) rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money (*q*).

The statute applies only in favour of the immediate landlord (*r*), and it is immaterial that such landlord is himself a lessee (*s*). Hence, in the case of a building lease, it is the building owner, and not the ground landlord, who can use the statute against the execution creditor of the occupying tenant. The execution (which by analogy includes a sequestration (*t*)) must be levied at the instance of a third person, not of the landlord himself; and hence the landlord cannot by virtue of the statute retain his rent out of proceeds of an execution which he has to refund to the tenant's trustee in bankruptcy (*u*). Where two executions

(*mm*) C. 18 in Stats. Rev. (*n*) *Forster v. Cookson*, 1841, 1 Q. B. 419.

(*o*) See *Yates v. Rutledge*, 1860, 5 H. & N. 249.

(*p*) The landlord is entitled to a full year's rent, although he has been used to remit some portion of it to the tenant: *Williams v. Lewsey*, 1831, 8 Bing. 28.

(*q*) This enactment does not apply to goods taken in execution under the warrant of a county court. See *infra*, p. 296.

(*r*) *Bennet's Case*, 1727, 2 Str. 787.

(*s*) *Thurgood v. Richardson*, 1831, 7 Bing. 428.

(*t*) *Dixon v. Smith*, 1818, 1 Swanst. 457.

(*u*) *Taylor v. Lanyon*, 1830, 6 Bing. 536.

are levied, the landlord cannot have a year's rent on each (*x*). The statute applies only where there is an existing tenancy (*y*) (including a tenancy created upon attornment by way of security (*z*)), at a certain rent (*a*). Occupation money agreed to be paid by a purchaser at a rate of so much a year till the purchase is completed is, for this purpose, money due as rent (*b*). But the rent must be actually due at the time of levy (*c*). Rent accruing due after the taking, and during the sheriff's continuance in possession, cannot be claimed under the statute (*d*). If, however, the sheriff returns that he has paid so much "for rent due for the premises," it will be assumed that the payment was for rent due at the time of seizure (*e*).

The sheriff is not bound to find out if any rent is due to the landlord; the latter ought to inform him (*f*). But express notice to the sheriff is not necessary, and the duty imposed on him by the statute attaches if he knows that rent is due (*g*). When, however, a claim is made by the landlord, the law casts on the sheriff the responsibility of ascertaining that the relationship of landlord and tenant really exists, and he is entitled to see the lease (*h*). If this relationship appears, the burden of proving that no rent is due seems to be thrown on the

Duty of
sheriff.

(*x*) *Dod v. Saxby*, 1736, 2 Str. 1024.

(*y*) *Hodgson v. Gascoigne*, 1821, 5 B. & A. 88; *Riseley v. Ryle*, 1842, 10 M. & W. 101; *Cox v. Leigh*, 1874, L. R. 9 Q. B. 333.

(*z*) *Yates v. Rutledge*, 1860, 5 H. & N. 249.

(*a*) *Riseley v. Ryle*, 1843, 11 M. & W. 16.

(*b*) *Saunders v. Musgrave*, 1827, 6 B. & C. 524.

(*c*) *Gwilliam v. Barker*, 1815, 1 Price, 274.

(*d*) *Hoskins v. Knight*, 1813, 1 M. & S. 245; *Reynolds v. Barford*, 1844, 7 M. & Gr. 449; *Re Benn Davis*, 1886, 55 L. J. Q. B. 217.

(*e*) *Reynolds v. Barford*, *supra*.

(*f*) *Smith v. Russell*, 1811, 3 Taunt. 400; *Gawler v. Chaplin*, 1848, 2 Ex. 503. Notice may be given by the landlord in the following form:—
To the sheriff of the county of —, and to his officer.

Take notice, that there is owing to me from my tenant, C. D., of —, the sum of £—, for [one year's] rent, due on the — day of — last, in respect of the house [or farm] at —, in the county of —, in his occupation; and I require you not to remove the goods seized by you in execution in the said house [or upon the said farm] until the said arrears of rent have been paid.

Dated this — day of —, 18—.

E. F.

(*g*) See per Parke, B., in *Riseley v. Ryle*, 1843, 11 M. & W. at p. 20; *Andrews v. Dixon*, 1820, 3 B. & A. 645.

(*h*) *Augustien v. Challis*, 1847, 1 Ex. 279, 280; *Keightley v. Birch*, 1814, 3 Camp. 521.

sheriff (*i*). The sheriff cannot interplead if the claim of the landlord is disputable (*k*).

When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid (*l*), and the rent must be paid without any deduction for poundage (*m*). If the goods are less in value than the rent lawfully claimed, the sheriff should withdraw (*n*). If they exceed this value, he may levy both for the rent and the execution (*o*), and at his own risk remove the goods, and after sale pay the landlord his year's rent. If he does so, and exhausts the proceeds of sale in payment of rent and expenses, he can make a return of *nulla bona* to the writ (*p*). But the proper course is for the sheriff to apply to the execution creditor for the money with which to satisfy the claim of the landlord. If the execution creditor provides it, the sheriff pays the landlord and proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute, and may return *nulla bona*, and withdraw from possession (*q*). Until the rent is paid, there are no goods out of which the sheriff is bound to levy—that is, which he is bound to sell (*r*).

Liability of
sheriff.

The sheriff infringes the statute, and renders himself liable to an action (*s*) by the landlord, if, knowing that rent is in arrear, he removes any of the goods without retaining that rent (*t*). The execution creditor has nothing to do with the removal, and is not liable (*u*). To ground the

(*i*) See *Harrison v. Barry*, 1819, 7 Price, 690.

(*k*) *Bateman v. Farnsworth*, 1860, 29 L. J. Ex. 365, decided on 1 & 2 Will. 4, c. 58, s. 6. Cf. the similar words of R. S. C. 1883, Ord. 57, r. 1 (*h*).

(*l*) *Thomas v. Mirehouse*, 1887, 19 Q. B. D. 563, 566; *Riseley v. Ryle*, 1843, 11 M. & W. p. 21. (*m*) *Gore v. Goston*, 1726, 1 Str. 643.

(*n*) See *Foster v. Hilton*, 1831, 1 Dowl. 35.

(*o*) See *Colyer v. Speer*, 1820, 2 Br. & B. 67, 70.

(*p*) *Wintle v. Freeman*, 1841, 11 A. & E. 539.

(*q*) Per Lord Esher, M.R., in *Thomas v. Mirehouse*, 1887, 19 Q. B. D. p. 566. See *Davidson v. Allen*, 1886, 20 L. R. Ir. 16; *Re McCarthy*, 1881, 7 L. R. Ir. 473.

(*r*) Per Lord Denman, C.J., in *Cocker v. Musgrove*, 1846, 9 Q. B. at p. 235. See *White v. Binstead*, 1853, 13 C. B. at p. 307; *Culvert v. Jolliffe*, 1831, 2 B. & Ad. 418. (*s*) See *Green v. Austin*, 1812, 3 Camp. 260.

(*t*) *Colyer v. Speer*, 1820, 2 Br. & B. p. 69; *Riseley v. Ryle*, 1843, 11 M. & W. 16; *Henchett v. Kimpson*, 1762, 2 Wils. 140.

(*u*) *Cocker v. Musgrove*, 1846, 9 Q. B. p. 230.

action there must be an actual or constructive removal of the goods (*x*), but the landlord is not restricted to the action. Even after removal and sale of the goods he has a direct claim against the proceeds of sale so long as they are in the hands of the sheriff (*y*), and application may be made in chambers for payment of arrears of rent out of the proceeds (*z*). And so, too, if the goods are sold before removal, and the landlord has not given notice of his claim till after the sale (*z*). The action may be brought by the administrator of the landlord (*a*); provided, at least, administration has been granted and demand of the rent made before the goods have been removed (*b*).

In an action against the sheriff for removing goods taken in execution without paying the landlord's claim, the measure of damages is *prima facie* the amount of rent due; but the sheriff may prove in mitigation of damages that the value of the goods removed was less than the amount of rent due (*c*), though for this purpose the amount produced at a forced sale of the goods by the sheriff is not the test of their value (*c*). If the goods are returned by the sheriff, the landlord has no action, for, while the goods are *in custodia legis*, he cannot distrain, and suffers, therefore, no damage (*d*). If the sheriff sells before payment of the rent, the action will not be stopped on paying the proceeds of sale into court, for these are not the measure of damages (*e*). If the landlord accepts the sheriff's undertaking to pay the year's rent, and allows the goods to be removed, he loses his action on the statute, and, should the undertaking be unenforceable under the Statute of Frauds—as for not stating the consideration—he is without remedy (*f*).

Measure of
damages
against
sheriff.

If the landlord is induced to withdraw a distress on the tenant's false assurance that a particular debt is satisfied,

Execution
after with-
drawal by
landlord.

(*x*) *Smallman v. Pollard*, 1844, 6 M. & Gr. 1001.

(*y*) *Arnitt v. Garnett*, 1820, 3 B. & A. 440; *Yates v. Ratledge*, 1860, 5 H. & N. 249, 252; *Re Mackenzie*, 1899, 68 L. J. Q. B. 1003.

(*z*) *Yates v. Ratledge*, *supra*.

(*a*) *Pulgrave v. Windham*, 1720, 1 Str. 212.

(*b*) *Waring v. Dewberry*, 1718, 1 Str. 97.

(*c*) *Thomas v. Mirehouse*, 1887, 19 Q. B. D. 563.

(*d*) *Lane v. Crockett*, 1819, 7 Price, 566.

(*e*) *Foster v. Hilton*, 1831, 1 Dowl. 35; *Calvert v. Jolliffe*, 1831, 2 B. & Ad. 418. See *Groombridge v. Fletcher*, 1834, 2 Dowl. 353.

(*f*) *Rothery v. Wood*, 1811, 3 Camp. 24.

and then there is judgment and execution on the debt, the landlord is entitled to his year's rent under the statute (g).

Statute
limited to
goods which
sheriff can
seize.

But not
excluded by
bankruptcy of
tenant.

The operation of the statute is restricted to such goods as the sheriff can seize; hence in an execution against the tenant it only refers to the tenant's goods (h). Consequently, if the sheriff seizes under an execution goods of a stranger and receives notice of a claim for rent by the landlord, he cannot apply the produce of sale of the stranger's goods in payment of the rent (h). But the bankruptcy of the tenant, although his goods thereupon pass to his trustee, does not prevent the sheriff from satisfying the landlord's claim. By the execution the goods are placed in *custodia legis*, so that the landlord cannot distrain, while the bankruptcy alone would not take away his right of distress. Hence the sheriff is justified in paying the landlord's claim out of the proceeds of sale notwithstanding that he has had notice of the bankruptcy (i), unless, indeed, the bankruptcy makes the execution void (k). Where there is a dispute as to the ownership of goods taken in execution, and the goods are sold under an order in interpleader proceedings, the sheriff is not justified in paying the rent out of the proceeds (l).

Weekly
tenancies.

In the case of weekly and other tenancies for less than a year, the arrears of rent which may be claimed upon an execution are specially restricted by the Execution Act, 1844 :—

7 & 8 Vict.
c. 96, s. 67.

Landlord of
weekly tenant
to claim four
weeks' arrears
only.

No landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment.

Execution in
the county
court.

For the case of goods taken in execution under county

(g) *Wollaston v. Stafford*, 1854, 15 C. B. 278.

(h) *Beard v. Knight*, 1858, 8 E. & B. 865. See *Reed v. Thoyts*, 1840, 6 M. & W. 410.

(i) *Re Mackenzie*, 1899, 68 L. J. Q. B. 1003; *Re Driver*, 1899, 43 Sol. Journ. 705.

(k) See remarks of C. A. in *Re Mackenzie*, *supra*, on *Gethin v. Wilks* 1833, 2 Dowl. 189; and *cf. Lee v. Lopes*, 1812, 15 East, 230.

(l) *White v. Binstead*, 1853, 13 C. B. 304.

court process provision is made by sect. 160 of the County Courts Act, 1888 :—

Sect. 1 of the Act of 8 Anne, c. 14, shall not apply to goods taken in execution under the warrant of a county court; but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made, the bailiff (*n*) or officer making the levy shall, in addition thereto, distrain for the rent so claimed and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken, unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of, and incident to, the sale; next the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week; the rent of two terms of payment where the tenement is let for any other term less than a year; and the rent of one year in any other case; and, lastly, the amount for which the warrant issued: and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of, and incident to, the sale under the execution and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods shall be returned to the defendant, and the poundage of the high bailiff and broker for keeping possession, appraisalment, and sale under such distress (*o*) shall be the

51 & 52 Vict.
c. 43, s. 160.

Where goods are seized under warrant of county court, landlord may claim certain arrears of rent.

Such arrears not to exceed, in weekly tenancy, rent of four weeks; in tenancy for less than a year, rent of two terms of payment; and in any other case, one year's rent.

(*n*) The bailiff in levying is under the common law liability for negligence, notwithstanding the summary procedure of sect. 49 of the County Courts Act, 1888: *Watson v. White*, 1896, 12 T. L. R. 387.

(*o*) Where the high bailiff seizes goods under an execution, and then seizes further goods on the same premises under a claim for rent, he is entitled to a separate set of fees in respect of each seizure: *Re Broster*, *Ex parte Pruddah*, 1897, 2 Q. B. 429. See sect. 154.

same as would have been payable if the distress had been an execution of the court, and no other fees shall be demanded or taken in respect thereof.

Under this section only the goods of the execution debtor can be seized to pay the rent due to the landlord (*p*); but it is not necessary that they should be the goods of the tenant. Goods of an execution debtor must satisfy the landlord's claim for rent in respect of the premises where they happen to be (*q*). Where different lands are held by a tenant at separate rents under the same landlord, the rent of each tenement for the prescribed period must be paid out of the goods on it at the time of the levy (*r*).

Execution
under
Admiralty
process.

Where goods have been taken in execution under any process of the Admiralty Division of the High Court, and a claim is made by any landlord for rent, the judge of the Admiralty Court has jurisdiction to adjudicate upon the claim, and all other proceedings must be stayed (*s*).

(iii.) *Remedy on Bankruptcy of Tenant.*

Subject to
Bankruptcy
Act, 1883,
landlord can
distrain not-
withstanding
bankruptcy.

Apart from the restriction imposed by statute (*t*), the bankruptcy of the tenant does not interfere with the landlord's right of distress (*u*), and for his protection he should on the bankruptcy distrain for rent then due (*r*). He may do this at any time while the tenant's goods remain on the premises, notwithstanding that the trustee has taken possession—for such possession does not place the goods *in custodia legis* (*x*)—and even after the goods have been sold by the trustee (*y*). But to gain a lien upon the goods the landlord must actually distrain (*z*). If the landlord permits the goods to be removed from the premises

(*p*) *Beard v. Knight*, 1858, 8 E. & B. 865; *Foulger v. Taylor*, 1860, 5 H. & N. 202.

(*q*) *Hughes v. Smallwood*, 1890, 25 Q. B. D. 306.

(*r*) *Gage v. Collins*, 1867, L. R. 2 C. P. 381.

(*s*) Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 16.

(*t*) *Infra*, p. 299.

(*u*) *Crosse v. Welch*, 1892, 8 T. L. R. 709. See judgment of Denman, J., p. 401; *Ex parte Till*, 1873, 16 Eq. 97.

(*v*) *Gethin v. Wilks*, 1833, 2 Dowl. 189.

(*x*) *Ex parte Grove*, 1747, 1 Atk. 104; *Briggs v. Sowry*, 1841, 8 M. & W. 729; *Re Collins*, 1888, 21 L. R. Ir. 508.

(*y*) *Ex parte Plummer*, 1739, 1 Atk. 103.

(*z*) *Re Suffield and Watts*, 1888, 20 Q. B. D. 693.

without distraining, he can only be considered as a common creditor, and must come in *pro ratâ* (*b*). Similarly he will lose his preference if he abandons the distress (*c*), or if he allows the goods to remain in the order and disposition of the bankrupt (*d*). If, however, the landlord forbears to distrain upon the undertaking of the trustee to treat the rent as a first charge (subject to preferential payments under the Preferential Payments in Bankruptcy Act, 1888) on the proceeds of sale, the order of payment will be (1) preferential creditors; (2) landlord; (3) costs of administration, &c. (*e*).

A landlord who has a right to distrain for arrears of rent, and who receives payment, is entitled to retain the money against the trustee in bankruptcy (*f*), even though at the time of payment there are no goods on the premises upon which a distress can be levied (*g*). And if the landlord buys goods from the trustee in bankruptcy upon the premises, it seems that he can retain out of the price of the goods the amount of rent for which he could have distrained (*h*), such an amount being limited to the six months' arrears allowed by the Bankruptcy Act (*i*). A stranger who pays off a distress for rent is entitled to be repaid out of the bankrupt tenant's estate in priority to the creditors (*j*); and a stranger who pays rent to prevent a distress, and recoups himself by selling goods of the bankrupt, is entitled to retain the amount against the trustee in bankruptcy (*k*).

Effect of payment where landlord is entitled to distrain.

By sect. 42 (1) of the Bankruptcy Act, 1883, it is provided as follows:—

Statutory restriction on distress against bankrupt tenant.

The landlord, or other person to whom any rent is due from the bankrupt (*kk*), may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him

Distress levied after commencement of

(*b*) *Ex parte Descharmes*, 1742, 1 Atk. 103.

(*c*) *Bagge v. Mauby*, 1853, 8 Ex. 641.

(*d*) *Ex parte Shuttleworth*, 1832, 1 D. & C. 223.

(*e*) *Re Chapman*, 1894, 10 T. L. R. 449.

(*f*) *Stevenson v. Wood*, 1805, 5 Esp. 200.

(*g*) *Mavor v. Croome*, 1823, 1 Bing. 261.

(*h*) *Buckley v. Taylor*, 1788, 2 T. R. 600.

(*i*) *Re Griffith*, 1897, 66 L. J. Q. B. 763.

(*j*) *Ex parte Kennard*, 1870, 21 L. T. 684.

(*k*) *Ex parte Elliott*, 1838, 3 M. & A. 664.

(*kk*) See *Ex parte Harrison*, 1884, 13 Q. B. D. 753.

bankruptcy to
be available
for six
months' rent
only.

from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy (*l*), it shall be available only for six months' (*m*) rent accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

The section applies to an order under the Act for the administration of the estate of a debtor whose debts do not exceed 50*l.*, or of a deceased person who dies insolvent (*n*); but not to an order for administration made in the Chancery Division (*o*).

It does not protect a distress levied for a mere sham rent created to give a mortgagee an additional security in bankruptcy (*p*); but a distress under an ordinary attornment clause is good against the trustee in bankruptcy (*q*).

Effect of
restriction.

The effect of the statute, taken with the previous law, is, that if the distress is levied before the commencement of the bankruptcy, the landlord is subject only to the limitation of six years under the Real Property Limitation Act, 1833 (*r*). If the distress is levied after the commencement of the bankruptcy, the landlord can recover under it only six months' arrears accrued due prior to the order of adjudication (*s*); and if the order is made in the interval between

(*l*) The bankruptcy of a debtor shall be deemed to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition: sect. 43. See *Ex parte Bayly*, 1852, 22 L. J. Bank. 26; *Paull v. Best*, 1863, 3 B. & S. 537; *Re Crook*, 1892, 66 L. T. 29.

(*m*) This period was substituted by sect. 28 of the Bankruptcy Act, 1890, for the former period of one year. See *Ex parte Dyke*, 1882, 22 C. D. p. 425.

(*n*) Sub-sect. (2). See sects. 122, 125.

(*o*) *Re Fryman's Estate*, 1888, 38 C. D. 468.

(*p*) *Ex parte Williams*, 1877, 7 C. D. 138; *Ex parte Jackson*, 1880, 14 C. D. 725.

(*q*) *Ex parte Voisey*, 1882, 21 C. D. 442.

(*r*) 3 & 4 Will. 4, c. 27, s. 42. See *Ex parte Bayly*, 1852, 22 L. J. Bank. 26.

(*s*) As to the recovery of any excess received by the landlord or his agent, see *Re Crook*, 1892, 66 L. T. 29. As to the effect of an agreement varying the mode of payment, see *Re Smith and Hartogs*, 1895, 44 W. R. 79.

two rent-days, the rent up to the date of the order will be apportioned, and the landlord can distrain for it when the rent for the quarter or other period becomes due (*t*). For rent accruing due after the order of adjudication the landlord is entitled to distrain (*u*), even though it is a rent payable in advance, and for this purpose the leave of the Court is not required (*v*). The landlord is entitled also to prove his debt, but he cannot both distrain and prove (*x*), save where the proof is in respect of arrears exceeding the six months' limit.

The restriction upon the right of distress is imposed only for the benefit of the bankrupt's estate, and it does not apply to goods upon the demised premises which have been mortgaged beyond their value, and in which consequently the bankrupt has no interest (*y*). Nor does it apply to a distraint made by a superior landlord, or to a distraint upon the bankrupt's goods when upon the premises of a third person, the distraint being for rent due for such premises (*z*).

Cases where restriction does not apply.

The discharge of the bankrupt operates only to relieve him of personal liability, and does not affect the landlord's right to recover his rent by distress (*a*).

Discharge of bankrupt.

Where the landlord distrains on any goods of a bankrupt within three months next before the date of the receiving order, preferential debts under the Preferential Payments in Bankruptcy Act, 1888 (*b*), are a first charge on the goods distrained or the proceeds of sale thereof; provided that in respect of any money paid under any such charge the landlord shall have the same rights of priority as the person to whom such payment is made (*c*).

Preferential debts in bankruptcy.

(*t*) *Re Howell*, 1895, 1 Q. B. 844.

(*u*) *Briggs v. Sowry*, 1841, 8 M. & W. 729.

(*v*) *Ex parte Hale*, 1875, 1 C. D. 285.

(*x*) *Ex parte Grove*, 1747, 1 Atk. 104.

(*y*) *Brocklehurst v. Lawe*, 1857, 7 E. & B. 176. See *Railton v. Wood*, 1890, 15 A. C. 363.

(*z*) See Smith's L. C. 10th ed. I. 433; *Ex parte Harrison*, 1884, 13 Q. B. D. p. 765.

(*a*) *Newton v. Scott*, 1842, 10 M. & W. 471; *Briggs v. Sowry*, 1841, 8 M. & W. 729; *Phillips v. Sherrill*, 1845, 6 Q. B. 944.

(*b*) 51 & 52 Vict. c. 62.

(*c*) Sect. 1 (4).

(iv.) *Remedy on Winding-up.*

In general,
distress after
winding-up
is void.

25 & 26 Vict.
c. 89, s. 163.

Sect. 163 of the Companies Act, 1862, provides as follows :—

Where any company is being wound up by the Court, or subject to the supervision of the Court, any distress put in force against the estate or effects of the company after the commencement of the winding-up (*i.e.* after the presentation of the petition for the winding-up (sect. 84)) shall be void to all intents.

Sect. 10 of the Judicature Act, 1875, which for certain purposes assimilates the rules in the winding-up of companies to the rules in bankruptcy, does not operate to give the landlord of a company a right to distrain for rent due before the winding-up order (*e*).

But in some
cases distress
allowed.

Notwithstanding the generality of sect. 163, it has been held that a distress is a proceeding which may be commenced or proceeded with by leave of the Court under sect. 87 (*f*), which is as follows :—

Sect. 87.

When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose.

When leave
to distrain
will not be
given.

As a general rule, leave will not be given to distrain for rent accrued due before the commencement of the winding-up, if the lessor can prove for the rent against the assets of the company (*g*), nor for rent accruing due while the liquidator

(*e*) *Re Coal Consumers' Association*, 1876, 4 C. D. 625 ; *Re Bridgewater Engineering Co.*, 1879, 12 C. D. 181 ; *Thomas v. Patent Lionite Co.*, 1881, 17 C. D. p. 257 ; *Re South Kensington Co-op. Stores*, *ib.* 161.

(*f*) *Re Exhall Coal Mining Co.*, 1864, 4 D. J. & S. 377 ; *Re Lancashire Cotton Co.*, 1887, 35 C. D. 656 ; *Re Higginshaw Mills Co.*, 1896, 2 Ch. 544.

(*g*) *Re Coal Consumers' Association*, 1876, 4 C. D. 625 ; *Re Bridgewater Engineering Co.*, 1879, 12 C. D. 181. Where the lease is held by a trustee for the company, the lessor has no right of proof against the company, and he can take the goods of the company in the same manner as the goods of a stranger ; and so where the company has taken possession under an agreement for the assignment of the lease : *Re Lundy Granite Co.*, 1871, L. R. 6 Ch. 462 ; *Re Traders' N. Staff. Co.*, 1874, 19 Eq. 60 ; *Re Regent United Service Stores*, 1878, 8 C. D. 616. It makes no difference that the liquidator offers to allow the lessor to prove : *Re Regent U. S. Stores* ; or that he has taken as collateral security a promissory note of the company : *Ex parte Clemence*, 1883, 23 C. D. 154.

remains in possession of the demised premises after the winding-up, if this is by arrangement with the landlord and for the joint benefit of the landlord and the company (*h*) ; and leave will be refused if the liquidator simply abstains from trying to get rid of the property (*i*).

Primâ facie, sect. 163 prohibits the landlord's distress, and to get over it the landlord must show either that it is inequitable for the company or its liquidator to insist on the section—that is, that there is some special equity which entitles the landlord to ask the Court to relieve him of the burden of the section—or that it is a case in which the Court will allow distress to be put in so as to recover rent which ought to be paid as one of the expenses of winding-up (*j*).

Principle on which leave is given.

Thus leave to distrain for rent accruing due after the winding-up is given if the liquidator remains in possession for the convenience of the winding-up (*k*). But the fact that an indirect advantage accrues from the possession of the liquidator is not enough (*l*). If the goods to be distrained upon are mortgaged to debenture-holders to an amount exceeding their value, the landlord is entitled to distrain, upon the ground that the goods are not the goods of the company for the purpose of sect. 163 (*m*), and it makes no difference that the debenture-holders are willing to release their security (*m*).

Where the landlord is entitled to prove for the rent due before winding-up, and to be paid in full the rent accruing after winding-up, the rent will be apportioned as at the date of the winding-up petition or resolution, and he will be paid in full the part in respect of the period subsequent to that date (*n*) ; but where the rent is payable in advance, the landlord will be paid in full only so much as is due while the liquidator continues in beneficial occupation (*o*).

Apportionment of rent due before and after winding-up.

(*h*) *Re Progress Assurance Co.*, 1870, 9 Eq. 370.

(*i*) *Re Oak Pits Colliery Co.*, 1882, 21 C. D. p. 331.

(*j*) Per Cotton, L.J., in *Re Lancashire Cotton Co.*, 1887, 35 C. D. p. 662.

(*k*) *Re Oak Pits Colliery Co.*, 1882, 21 C. D. p. 330 ; *Re Lundy Granite Co.*, 1871, 6 Ch. p. 466 ; *Re N. Yorkshire Iron Co.*, 1878, 7 C. D. 661 ; *Re Silkstone Coal and Iron Co.*, 1881, 17 C. D. 158 ; *Re Higginsshaw Mills Co.*, 1896, 2 Ch. p. 550.

(*l*) *Re House and Land Investment Trust*, 1894, 42 W. R. 572.

(*m*) *Re New City Club*, 1887, 34 C. D. 646.

(*n*) *Re South Kensington Co-op. Stores*, 1881, 17 C. D. 161.

(*o*) *Shackell v. Chorlton*, 1895, 1 Ch. 378.

Distress by
mortgagee.

A mortgagee who is entitled to distrain under an attornment clause contained in a mortgage granted by the company does not, for the purpose of obtaining leave to distrain, stand in as good a position as a lessor (*p*); and though there may be circumstances which would make it just that mortgagees should have power to distrain for interest accrued since the winding-up, leave will not be given where the occupation by the liquidator has been for the joint benefit of the company and the mortgagee (*q*).

Right of
re-entry.

If the landlord has a right of re-entry, and seeks to exercise it, the liquidator can only retain the property on condition of complying with the legal obligation to pay rent (*r*), and in this way the landlord may be able to obtain payment in full.

Distress
levied before
winding-up.

Where the distress is already levied before the winding-up, the rule is in favour of the landlord, and the proceedings under the distress will be allowed to go on unless there are special circumstances rendering this course inequitable (*s*).

Preferential
debts.

Where a landlord has distrained on any goods of a company being wound up within three months next before the date of the winding-up order, preferential debts under the Preferential Payments in Bankruptcy Act, 1888 (*t*), are a first charge on the goods so distrained on, or the proceeds of sale thereof; provided that in respect of any money paid under any such charge the landlord shall have the same rights of priority as the person to whom such payment is made (*u*).

Proof for
future rent.

Formerly in the winding-up of a lessee company the lessor was allowed to prove for the whole value of the future rent, though with the qualification that he was not to receive more than the amount which the company might actually become liable to pay under the covenant in the lease (*x*); and in a case where the lessor did not wish the

(*p*) *Re Lancashire Cotton Co.*, 1887, 35 C. D. 656, see p. 663. Cf. *Re Brown, Bayley & Dixon*, 1881, 18 C. D. 649.

(*q*) *Re Higginshaw Mills Co.*, 1896, 2 Ch. 544.

(*r*) *Re Silkstone and Dodworth Co.*, 1881, 17 C. D. 158; *General Share Co. v. Wetley Brick Co.*, 1882, 20 C. D. 260.

(*s*) *Re Roundwood Colliery Co.*, 1897, 1 Ch. 373, per Stirling, J.

(*t*) 51 & 52 Viet. c. 62. (*u*) Sect. 1 (4).

(*x*) *Re Haytor Granite Co.*, 1865, 1 Ch. 77; *Re Horsey's Claim*, 1868, 5 Eq. 561; *Oppenheimer v. British, &c., Investment Bank*, 1877, 6 C. D. 744. Where a mortgagee of the lessor is in possession, see *Re Westbourne Grove Drapery Co.*, 1877, 5 C. D. 248.

lease to be given up, the same rule was recently followed (*y*), notwithstanding the principle as to proving future liabilities established by *Hardy v. Fothergill* (*z*). Where, however, the lessor is willing for the lease to be treated as determined, and desires to prove once for all for his loss on that footing, proof may be at once made in respect of all liabilities, present or future, certain or contingent; and even in a case where he is not so willing, it must not be taken for certain that, since *Hardy v. Fothergill*, he is entitled to the benefit of the old rule (*a*).

(v) *Remedy by Action.*

The remedy by distress does not exclude the right of the landlord to recover rent by action based on the contract between himself and the tenant. Where, however, he distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, even though it be insufficient to satisfy the rent (*b*). But after the sale he can bring an action to recover the deficiency (*c*).

Remedy by action not excluded by distress.

The granting of a new lease does not release rent due before its execution, although the deed is dated before the rent is due and the term is stated to have commenced before that date (*d*).

Or by new lease.

If the lease is by deed, the action may be either for rent on the indenture or on a covenant for payment of rent (*e*).

Actions for rent where lease is by deed.

Where the lease is not by deed, the action may be either for rent on the special contract or for use and occupation (*f*). In an action for rent on a lease at will occupation must be shown; but not where the lease is for years (*g*).

Actions for rent where lease is not by deed.

The action for use and occupation (*gg*) is given by the Distress for Rent Act, 1737:—

Use and occupation.

It shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the

11 Geo. 2, c. 19, s. 14.

(*y*) *Re New Oriental Bank Corp. Lim.*, 1895, 1 Ch. 753.

(*z*) 1888, 13 A. C. 351. (*a*) *Re Panther Lead Co.*, 1896, 1 Ch. 978.

(*b*) *Lehain v. Philpott*, 1875, L. R. 10 Ex. 242.

(*c*) *Philpott v. Lehain*, 1876, 35 L. T. 855.

(*d*) *Cooper v. Robinson*, 1842, 10 M. & W. 694.

(*e*) For the evidence in these actions, see Roscoe's Evidence, 16th ed. 694.

(*f*) For the evidence in these actions, see *Ibid*, 323.

(*g*) *Bellasis v. Burbrick*, 1697, 1 Salk. 209.

(*gg*) In use and occupation the plaintiff cannot recover rent payable in advance: *Angell v. Randall*, 1867, 16 L. T. 498. An equitable estate

Where agreement is not by deed, landlord may recover reasonable satisfaction.

lands, tenements or hereditaments held or occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed ; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered (*h*).

Entry necessary.

An action for use and occupation lies upon a contract, express or implied, to pay for the occupation (*i*), but only where the tenant has actually entered and occupied the premises (*k*), though he need not occupy for the whole term covered by the contract (*l*). Sending in people to clean and decorate the house is evidence of occupation (*m*).

Damages.

Under this form of action the measure of damages recoverable is usually the rent, where a rent has been agreed upon (*n*) ; and where no rent has been agreed upon, such sum as the jury may find the occupation to be worth (*o*). The agreed rent, however, is only evidence of the amount to be paid, and under special circumstances—as where the lessor has failed in a material point to fulfil his part of the contract—the jury may ascertain the value of the land without regard to the rent reserved (*p*).

Guarantee for rent.

If the rent has been guaranteed in writing, the landlord will have an action against the guarantor ; but for this purpose there must be a contract immediately between the landlord and the guarantor. Where A. addressed a letter

in the plaintiff will not support the action : *Cobb v. Carpenter*, 1809, 2 Camp. 13, note ; *Harris v. Booker*, 1827, 4 Bing. 96 ; though the defect in the plaintiff's title does not prejudice him, if he himself let the premises : *Fisher v. Marsh*, 1865, 6 B. & S. 411, or if his title has been recognised by payment of rent, *Dolby v. Nes*, 1840, 11 A. & E. 335.

(*h*) See *infra*, p. 263, as to pleading a previous distress.

(*i*) *Hall v. Burgess*, 1826, 5 B. & C. at p. 333 ; *Gibson v. Kirk*, 1841, 1 Q. B. 850 ; *Smith v. Eldridge*, 1854, 15 C. B. 236 ; *Dawes v. Dowling*, 1874, 31 L. T. 65 ; *Sloper v. Saunders*, 1860, 29 L. J. Ex. 275 ; *Churchward v. Ford*, 1857, 26 L. J. Ex. 354.

(*k*) See *Edge v. Strafford*, 1831, 1 Cr. & J. 391 ; *How v. Kennett*, 1835, 3 A. & E. 659 ; *Low v. Ross*, 1850, 5 Ex. 553 ; *Towne v. D'Heinriche*, 1853, 13 C. B. 892.

(*l*) *Smallwood v. Sheppards*, 1895, 2 Q. B. 627, 629.

(*m*) *Smith v. Twout*, 1841, 2 M. & Gr. 841.

(*n*) See *Gretton v. Mees*, 1878, 7 C. D. 839.

(*o*) *Mayor of Thetford v. Tyler*, 1845, 8 Q. B. at p. 100.

(*p*) *Tomlinson v. Day*, 1821, 2 Br. & B. 680.

to an intending tenant undertaking to be responsible for the rent, and the landlord on sight of this letter accepted the tenant, it was held that, since there was no agreement between the landlord and A., the latter was not liable (*q*).

A tenant for years cannot be made personally liable in an action of debt for non-payment of a rent-charge issuing out of the land (*r*). Liability for rent-charge.

In an action against a tenant for rent in arrear, interest at the current rate from the day fixed for payment may be recovered (*s*). Interest on rent.

By sect. 1 of the Real Property Limitation Act, 1874 (*t*), a limit of twelve years is prescribed for the recovery of "any land or rent"; but the word "rent," as used here, refers to rents in the nature of rent-charges, and does not include rents reserved on leases for years (*u*). Rents of the latter class are subject to the conflicting periods of limitation provided by 3 & 4 Will. 4, c. 27 (*x*), s. 42, and 3 & 4 Will. 4, c. 42, s. 3:— Statute of Limitations.

No arrears of rent shall be recovered by any action but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. 3 & 4 Will. 4, c. 27, s. 42.
If lease not by deed, action for arrears of rent to be brought within six years.

All actions of debt for rent upon an indenture of demise, and all actions of covenant or debt upon bond or other specialty, shall be commenced and sued within twenty years after the cause of such actions (*y*), but not after. 3 & 4 Will. 4, c. 42, s. 3.
If lease is by deed, action to be brought within twenty years.

(*q*) *Nash v. Spencer*, 1896, 13 T. L. R. 78.

(*r*) *Re Herbage Rents, Greenwich*, 1896, 2 Ch. 811.

(*s*) 3 & 4 Will. 4, c. 42, s. 28; *Skerry v. Preston*, 1813, 2 Chit. R. 245. See also as to levying under a writ of execution interest at 4 per cent. from the date of the judgment, R. S. C. 1883, Ord. 42, r. 16. As to interest payable by Crown tenants, see 10 Geo. 4, c. 50, s. 91.

(*t*) 37 & 38 Vict. c. 57.

(*u*) *Grant v. Ellis*, 1841, 9 M. & W. 113; *Archbold v. Scully*, 1861, 9 H. L. C. p. 375; *Irish Land Commissioners v. Grant*, 1884, 10 App. Cas. p. 26. See *De Beauvoir v. Owen*, 1850, 5 Ex. 166, as to quit rents.

(*x*) Real Property Limitation Act, 1833.

(*y*) Except in case of the disability or absence beyond seas of the person entitled to such action, or in case an acknowledgment has been made either in writing, signed by the person liable by virtue of such indenture, or his agent, or by part payment, or part satisfaction. See sects. 4, 5.

These enactments have been reconciled by treating the latter as engrafting an exception upon the former; so that while all remedies, real and personal, for arrears of rent, are *primâ facie* subject to the six years limitation of c. 27, s. 42 (z), actions on a covenant to pay rent or upon an indenture of demise can be brought for twenty years' arrears (a).

SECT. II.—REPAIRS.

	PAGE
(1) Where there is no express agreement	308
Obligations of tenant	308
" landlord	309
(2) Where there is an express agreement	311
Construction of general covenant to repair	311
" covenant to put into repair	313
" covenant to keep in repair	314
" covenant to yield up in repair	316
" conditional covenant to repair	318
" special agreements to repair	319
Repairs by lessor	321
Measure of damages for breach of covenant	322

(1) WHERE THERE IS NO EXPRESS AGREEMENT.

Obligations of Tenant.

Tenants from
year to year.

A tenant from year to year of a house is only bound to keep it wind and water-tight (b), to use it in a tenant-like manner (c), and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises (d). He must not *commit* any waste (d), but he cannot be compelled to replace doors, windows or stairs worn out with age (e), or to re-roof the house, renew the main timbers, or execute other general or substantial repairs (f).

(z) See *Hunter v. Nockolds*, 1850, 1 Mac. & G. 640; *Humfrey v. Gery*, 1849, 7 C. B. 567.
(a) *Darley v. Tennant*, 1885, 53 L. T. 257; *Donegan v. Neill*, 1885, 16 L. R. Ir. 309.
(b) *Aurworth v. Johnson*, 1832, 5 C. & P. 239; *Leach v. Thomas*, 1835, 7 C. & P. 327. (c) *Horsefall v. Mather*, 1815, Holt, N. P. 7.
(d) Per Lord Kenyon, C.J., in *Ferguson v. —*, 1798, 2 Esp. 590. The liability of a copyhold tenant to repair under the custom of the manor is contractual, and survives against his personal representatives: *Blackmore v. White*, 1899, 1 Q. B. 293.
(e) *Aurworth v. Johnson*, 1832, 5 C. & P. 239. See *Torriano v. Young*, 1833, 6 C. & P. 8; *Martin v. Gillham*, 1837, 7 A. & E. 540.
(f) *Ferguson v. —*, 1798, 2 Esp. 590; *Horsefall v. Mather*, 1815, Holt, N. P. 7; *Leach v. Thomas*, 1835, 7 C. & P. 327.

Tenants for terms of years are under a more extensive obligation to repair, since it appears that they are liable for permissive waste, though not tenants for life (g). Tenants for years or life.

An express agreement to repair excludes the implied contract to use the premises in a tenantable manner (h).

The liability of a tenant for the results of *accidental fire* is excluded by the Fires Prevention (Metropolis) Act, 1774:— Accidental fire.

No action, suit or process whatsoever shall be maintained against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally (*i.e.* as the result of chance, and not of negligence or want of reasonable care (*i*)) begin; nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding: provided that no contract or agreement made between landlord or tenant shall be hereby defeated or made void (k). 14 Geo. 3, c. 78, s. 86.
No action maintainable for accidental fires.

This enactment, though occurring in a statute which in the main applies only to the metropolis, is of general application (l).

Obligations of Landlord.

Where there is no stipulation on the subject, a person who agrees to take a house must take it as it stands, and cannot compel the lessor to put it into a condition fit for habitation (m). As between the landlord and tenant of premises let from year to year, there is no obligation upon Liability of landlord to repair.

(g) *Infra*, p. 328. As to the right of a tenant in common of a house to compel his co-tenant to contribute to the expenses of repairs, see *Leigh v. Dickeson*, 1883, 12 Q. B. D. 194; 15 *ib.* 60.

(h) *Standen v. Christmas*, 1847, 10 Q. B. 135. But *contra*, *White v. Nicholson*, 1842, 4 M. & Gr. 95.

(i) *Filliter v. Phippard*, 1847, 11 Q. B. 347. See *Canterbury v. Reg.*, 1843, 12 L. J. Ch. 281, 284; *Hicks v. Downing*, 1697, 1 Ld. Raym. 99.

(k) *Infra*, p. 313.

(l) *Richards v. Easto*, 1846, 15 M. & W. p. 251; *Filliter v. Phippard*, *supra*.

(m) *Chappell v. Gregory*, 1864, 34 Beav. 250. But in the case of weekly tenancies there appears to be an implied agreement that the landlord shall keep the premises in repair: *Broggi v. Robins*, 1898, 14 T. L. R. 439. As to the statutory implied condition as to the state of premises let to the working classes, see *infra*, p. 331. The landlord is liable for damage resulting from failure to observe this condition: *Walker v. Hobbs & Co.*, 1889, 23 Q. B. D. 458.

the former to do substantial repairs during the continuance of the lease, unless there is an express agreement to that effect (*n*) ; nor is there any such obligation where the premises are let for a term of years (*o*). If the demised premises are burnt down during the lease, the landlord is not bound to rebuild them (*p*), even though he has received insurance money (*q*), or has covenanted for quiet enjoyment by the tenant (*r*). Although the lessee's covenant to repair contains an express exception of damage by fire and tempest, it seems that the landlord is not bound to repair in either of the excepted cases (*s*).

Tenement
house.

Where the landlord of a house let in apartments allows a tenant to use the roof as a drying ground, there is no obligation on him to keep the fence to the roof in repair (*t*) ; but it is otherwise with a common staircase, and an action will lie at the suit of a person having business with the tenants who is injured by its defective condition (*u*).

Landlord
occupying
part of
premises.

A landlord who occupies the upper part of a house is not liable for an accidental defect in a gutter owing to which the goods of a tenant on the ground floor are spoiled by water (*x*) ; and similarly as to the escape of water from a cistern or waterpipe. The water is brought into the house for the common benefit of all the occupants, and the landlord is not liable unless actual negligence can be proved against him (*y*). And generally a landlord, who occupies part of the premises, is under no liability to keep them in such repair as to render the demised part habitable (*z*). This rule, however, must be received with caution since *Miller v. Hancock* (*u*), and it is probable that the landlord

(*n*) *Gott v. Gandy*, 1853, 2 E. & B. p. 847.
(*o*) *Arden v. Pullen*, 1842, 10 M. & W. 321.
(*p*) *Bayne v. Walker*, 1815, 3 Dow, 233.
(*q*) *Leeds v. Cheetham*, 1827, 1 Sim. 146 ; *Lofft v. Dennis*, 1859, 1 E. & E. 474.
(*r*) See *Brown v. Quilter*, 1764, 2 Ambl. at p. 620.
(*s*) Judgment of Lord Kenyon, C.J., in *Weigall v. Waters*, 1795, 6 T. R. at p. 488.
(*t*) *Ivay v. Hedges*, 1882, 9 Q. B. D. 80.
(*u*) *Miller v. Hancock*, 1893, 2 Q. B. 177.
(*x*) *Carstairs v. Taylor*, 1871, L. R. 6 Ex. 217. Cf. *Anderson v. Oppenheimer*, 1880, 5 Q. B. D. 602.
(*y*) *Ross v. Fedden*, L. R. 7 Q. B. 661 ; *Blake & Co. v. Woolf*, 1898, 2 Q. B. 426.
(*z*) *Colebeck v. Girdlers' Co.*, 1876, 1 Q. B. D. 234. See notes to *Pomfret v. Ricroft*, 1 Wms. Saund. ed. 1871, 557 ; *Carstairs v. Taylor*, *ubi sup.* p. 223.

is liable for repairs which are necessary for the convenience and safety of the building as a whole.

Primâ facie the liability to a stranger for an accident due to the defective state of the premises is on the tenant (*b*); but it is shifted to the landlord where the duty to repair is by the lease imposed on him (*c*); and it was formerly held that the landlord was equally liable where the defect existed at the time of letting (*d*), and no duty to repair was imposed upon the tenant (*e*). But to charge the landlord it is necessary in either case that he should have notice of the defect (*f*). The continuance of a yearly or weekly tenancy is not a re-letting so as to make the landlord liable in respect of the state of the premises at the beginning of each year (*g*) or week (*h*). More recently, however, the view has prevailed that a landlord who is under no obligation to repair is not responsible to persons using the premises for injury due to want of repair (*i*). Liability to strangers.

The landlord is liable for a nuisance existing at the time of the demise (*k*), or created by the act of the tenant where the terms of the demise are an authority to create the nuisance (*l*). But otherwise, since the landlord has no power or right of interference, he incurs no responsibility (*m*).

(2) WHERE THERE IS AN EXPRESS AGREEMENT.

Under a *general covenant to repair* a house, the tenant must keep it in substantial repair, according to the age and nature of the building (*n*). Construction of general covenant to repair.

(*b*) *Pretty v. Bickmore*, 1873, L. R. 8 C. P. 401; *Norris v. Catmur*, 1885, C. & E. 576. See *Gwinnell v. Eamer*, 1875, L. R. 10 C. P. 658.

(*c*) *Payne v. Rogers*, 1794, 2 H. Bl. 349; *Mills v. Temple-West*, 1885, 1 T. L. R. 503.

(*d*) *Todd v. Flight*, 1860, 9 C. B. N. S. 377; *Robbins v. James*, 1863, 15 C. B. N. S. 221, 240; *Nelson v. Liverpool Brewery Co.*, 1877, 2 C. P. D. 311.

(*e*) *Pretty v. Bickmore*, *supra*; *Gwinnell v. Eamer*, *supra*.

(*f*) *Gwinnell v. Eamer*, *supra*; *Broggi v. Robins*, 15 T. L. R. 224.

(*g*) *Gandy v. Jubber*, 1865, 9 B. & S. p. 15.

(*h*) *Bowen v. Anderson*, 1894, 1 Q. B. 164; overruling *Sandford v. Clarke*, 21 Q. B. D. 398.

(*i*) *Lane v. Cox*, 1897, 1 Q. B. 415; *Copp v. Aldridge & Co.*, 1895, 11 T. L. R. 411.

(*k*) *R. v. Pedley*, 1 A. & E. 822; *Gandy v. Jubber*, 1864, 5 B. & S. 78.

(*l*) *Harris v. James*, 1876, 45 L. J. Q. B. 545.

(*m*) Judgment of Crompton, J., in *Gandy v. Jubber*, 1864, 5 B. & S. p. 88; *Rich v. Basterfield*, 1847, 4 C. B. 783.

(*n*) *Harris v. Jones*, 1832, 1 Moo. & R. 173; *Stanley v. Towgood*, 1836, 3 Bing. N. C. 4.

It is perfectly well settled that a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate (*o*) ; and the jury may inquire whether the house was new or old at the time of the demise (*p*). No tenant is bound to leave for his landlord a new house, but the house which he took, in a state of fit repair as such house (*q*).

Repair of old premises.

If the house demised is an old one, the tenant is only bound to keep it up as an old house, and is not obliged to give the landlord the benefit of new work (*r*). It is not meant, in fact, that the old building is to be restored in a renewed form at the end of the term, so as to make the value of it greater than it was at the commencement of the term. Diminution in value, resulting from the natural operation of time and the elements, falls upon the landlord ; but the tenant must take care that the premises do not suffer more damage than the operation of these causes would effect, and he is bound, by seasonable applications of labour, to keep the house as nearly as possible in the same condition as when it was demised (*s*).

Hence, where the tenant has covenanted to repair drains, he is not bound to pay for the construction of a new drain by the local authority under the Public Health Act, 1875 (*t*). And the tenant is liable for repairs only, and not for alterations, such as laying a new floor on an improved plan (*u*). An agreement to keep a piece of ornamental water in good and substantial repair is performed by keeping the water from bursting its banks and by maintaining the sluices in working order (*x*). An agreement to do " necessary repairs " imposes on the tenant the burden of doing all repairs which are requisite during the term (*y*).

(*o*) Per Parke, B., in *Walker v. Hatton*, 1842, 10 M. & W. p. 258.

(*p*) *Stanley v. Tourgood*, *supra*. See *Mantz v. Goring*, 1838, 4 Bing. N. C. 451.

(*q*) *Scales v. Lawrence*, 1860, 2 F. & F. 289.

(*r*) Per Tindal, C.J., in *Harris v. Jones*, 1832, 1 Moo. & R. at p. 175.

(*s*) See summing up of Tindal, C.J., in *Gutteridge v. Munyard*, 1834, 1 Moo. & R. at p. 336.

(*t*) *Lyon v. Greenhow*, 1892, 8 T. L. R. 457.

(*u*) *Soward v. Leggatt*, 1836, 7 C. & P. 613.

(*x*) *Bird v. Elwes*, 1868, L. R. 3 Ex. 225.

(*y*) *Truscott v. Diamond Rock Boring Co.*, 1881, 20 C. D. 251.

Questions of repair are questions of fact for the jury to be decided on what are the substantial merits of the case rather than on strict rights. The landlord is not to claim for every trivial defect (z). A breach of the covenant is not excused because the covenantor has *bonâ fide* employed persons to repair. If his agents have not in fact repaired, there is no equity to relieve against the breach (a).

Breach of covenant to repair.

Unless the covenant by the tenant to repair contains an express exception of damage by fire or other casualty, he will be bound to rebuild or repair the demised premises if they should be burned down (b), or otherwise destroyed (c) or injured during the term. Although the lease contains a covenant by the tenant to insure the premises in a specified sum, he is still liable on the covenant to repair, and his responsibility is not limited to the sum named in the covenant to insure (d). But a tenant who has to leave the premises in the same state of repair as when delivered to him need not rebuild so as to improve the premises, and where the rebuilding would cost 1,635*l.* and would increase the value by 600*l.*, the damages for breach of the covenant were assessed at 1,035*l.* (e).

Where premises burned down.

Under a covenant to *put into habitable repair*, the tenant must, if necessary, place the demised premises in a better state than that in which he found them (f). He is not bound to make a new house, but regard being had to the state of the premises at the time of the agreement and to their situation, and to the class of persons who are likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit (f). A covenant "forthwith" to put premises into complete repair is not construed as referring

Covenant to put into repair.

(z) *Scales v. Lawrence*, 1860, 2 F. & F. 289, per Willes, J. As to the effect on the tenant's liability of a promise by the landlord before demise to do some repairs, see *Hallane v. Newcomb*, 1863, 12 W. R. 135.

(a) *Nokes v. Gibbon*, 1856, 3 Drew. 681. As to statutory relief, see *infra*, p. 472.

(b) *E. of Chesterfield v. D. of Bolton*, 1739, Comyn, 627; *Pym v. Blackburn*, 1796, 3 Ves. 34; *Bullock v. Dommitt*, 1796, 6 T. R. 659; *Digby v. Atkinson*, 1815, 4 Camp. 275. See *Clark v. Glasgow Ass. Co.*, 1854, 1 Macqueen, 668, p. 678; *Gregg v. Coates*, 1856, 23 Beav. 33.

(c) *Brecknock Co. v. Pritchard*, 1796, 6 T. R. 750; *Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507.

(d) *Digby v. Atkinson*, 1815, 4 Camp. 275, 278.

(e) *Yates v. Dunster*, 1855, 11 Ex. 15.

(f) *Belcher v. McIntosh*, 1839, 8 C. & P. 720.

to any specific time ; it is for a jury to say, upon a reasonable construction, whether it has been performed (*g*). A covenant to put in repair can only be broken once for all, and therefore if a breach has been committed in the time of the lessee, and damages recovered from him by the lessor in respect of such breach, the assignee of the lessee will not be liable (*h*).

Covenant to
keep in repair.

A covenant to *keep premises in good repair* binds the lessee to put them into good repair with reference to their age and class (*i*), to maintain them in that state, and in that state to deliver them up at the end of the term (*k*). He must have them constantly in repair, and if at any time during the term they are out of repair, he is guilty of a breach of covenant, which is the proper subject of an action before the expiration of the lease (*l*). But under a repairing and painting covenant he is not bound to fill up cracks in plaster and holes made by nails within the period fixed for re-decorating (*m*).

Breach of
covenant.

As this covenant is a continuing one, the recovery of damages upon it in a previous action is no bar to a subsequent action against the tenant or his assignee, so long as the premises are out of repair, but the fact may be used in mitigation of damages (*n*). It is a breach of this covenant to pull down the demised premises either wholly or partially, or to open a doorway in a wall (*o*), unless by the terms of the lease it is implied that additions and improvements are to be made (*p*). Where there was a covenant by the lessee to complete houses within two months and keep them in repair, and the houses were never finished, it was held that

(*g*) *Doe v. Sutton*, 1841, 9 C. & P. 706.

(*h*) See *Coward v. Gregory*, 1866, L. R. 2 C. P. 153.

(*i*) *Saner v. Bilton*, 1878, 7 C. D. p. 821.

(*k*) *Payne v. Haine*, 1847, 16 M. & W. 541 ; *Burdett v. Withers*, 1837, 7 A. & E. 136 ; *Woolcock v. Dew*, 1858, 1 F. & F. 337.

(*l*) *Luxmore v. Robson*, 1818, 1 B. & A. 584, 585.

(*m*) *Perry v. Chotzner*, 1893, 9 T. L. R. 488.

(*n*) *Coward v. Gregory*, 1866, L. R. 2 C. P. 153. As to continuing breach, see *Morris v. Kennedy*, 1896, 2 Ir. R. 247.

(*o*) *Gunyc v. Lockwood*, 1860, 2 F. & F. 115 ; *Doe v. Jackson*, 1817, 2 Stark. 293 ; *Doe v. Bird*, 1833, 6 C. & P. 195. Cf. *Borgnis v. Edwards*, 1860, 2 F. & F. 111.

(*p*) See *Doe v. Jones*, 1832, 4 B. & Ad. 126. As to damages on the covenant where the premises have been condemned by the local authority and demolished, see *Re Serle*, 1898, 1 Ch. 652 ; 46 W. R. p. 442.

the assignee of the reversion could sue in respect of the breach of the covenant to repair, though possibly not in respect of the covenant to finish, the breach of this covenant being complete before the assignment (*q*).

Upon a covenant to well and substantially repair, uphold, and maintain, and the premises so repaired to yield up at the end of the term, the tenant is not bound to make good a defect caused by the natural operation of time and the elements on a house the original construction of which was faulty (*r*). However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant (*s*). Similarly a covenant by a lessor to keep drains and sewers in good tenantable repair does not extend to a rectification of a structural defect, but is confined to keeping up the drains as they existed in the required state of repair (*t*). A tenant who has covenanted to *substantially repair, uphold and maintain* a house is bound to paint the inside woodwork, &c. (*u*). But a covenant to well and sufficiently repair, &c., paint, &c., and keep the demised premises with all needful reparations, does not necessarily involve the entire re-papering and painting (*x*).

Covenant to well and substantially repair.

Under an agreement to keep a house in "good tenantable repair," and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it, and it is immaterial that the house was not in tenantable repair when the tenancy began (*y*). Under such an agreement the tenant is liable to paint sufficiently to preserve the woodwork, but he is not necessarily bound to paper and paint so as to leave the house in the same state

Tenantable repair.

(*q*) *Bennett v. Herring*, 1857, 3 C. B. N. S. 370.

(*r*) *Lister v. Lane*, 1893, 2 Q. B. 212.

(*s*) Per Lord Esher, M.R., *ib.* at p. 217.

(*t*) *Huggall v. McKean*, 1884, C. & E. 391.

(*u*) *Monk v. Noyes*, 1824, 1 C. & P. 265.

(*x*) *Moxon v. Townshend*, 1886, 2 T. L. R. 717 ; affirmed, 3 T. L. R. 392.

(*y*) *Proudfoot v. Hart*, 1890, 25 Q. B. D. 42.

of decorative repair as when he took it (z). An agreement by the landlord to put the premises into "good tenantable repair" does not bind him to put them into such repair for any special purpose not stipulated for in the agreement (a).

What things
to be repaired.

An agreement to keep and leave the demised premises in good and substantial repair extends to all things which are properly a part of the premises, as the pavement of a courtyard (b), or, in a lease of a mill, the mill-wheel (c); and where there is a general covenant by the lessee to *repair and keep and leave in repair*, it will be inferred that he undertakes to repair buildings which may be erected during the term (d); and, *a fortiori*, where the covenant extends to "buildings erected and built or to be erected and built upon the demised ground or any part thereof" (e). On the other hand, a particular covenant to repair the demised buildings will be construed as referring only to existing buildings (f); while a covenant to leave the demised premises with all new erections well repaired has been held under special circumstances to extend to new erections only (g).

Covenant to
yield up in
repair.

A covenant to yield up in repair buildings erected during the term includes buildings erected for trade and manufacture if affixed to the freehold (h); and where a lessee who has erected fixtures takes a new lease with covenant to repair, the fixtures fall within the covenant unless it is clearly shown that they were not intended to pass under the second demise (i). But a removal of fixtures which the tenant does not immediately replace is not in itself a breach of the covenant to repair and deliver up, if they can be replaced before the end of the term (k).

Covenant to
rebuild.

A covenant to rebuild premises requires the rebuilding

(z) *Crawford v. Newton*, 1887, 36 W. R. 54.

(a) *McClure v. Little*, 1868, 19 L. T. 287.

(b) *Pyot v. St. John*, 1610, Cro. Jac. 329.

(c) *Openshaw v. Evans*, 1884, 50 L. T. 156.

(d) *Douse v. Earle*, 1689, 3 Lev. 264; 2 Ventr. 126; judgment of Channell, B., in *Cornish v. Cleife*, 1864, 34 L. J. Ex. at p. 22; *Brown v. Blunden*, 1684, Skin. 121.

(e) *Hudson v. Williams*, 1879, 39 L. T. 632.

(f) See *Cornish v. Cleife*, 1864, 3 H. & C. 446.

(g) *Lant v. Norris*, 1757, 1 Burr. 287.

(h) *Naylor v. Collinge*, 1807, 1 Taunt. 19.

(i) *Thresher v. E. London Waterworks Co.*, 1824, 2 B. & C. 608.

(k) *Doe v. Davis*, 1851, 15 Jur. 155.

of the whole; to rebuild some and repair some is not enough (*l*). But a covenant to pull down a house and build a new one does not require the erection of the new house in the same manner, and style, and shape, and with the same elevation as the old (*m*). And where the covenant is to put and keep in repair and take down as occasion may require and build new houses, it is enough to repair so as to make the houses substantially as good as new houses (*n*).

Covenants on the part of the tenant to *repair and keep in repair* the demised premises during the term, and to *repair specified defects within a certain time after notice* (*o*), are considered separate and independent covenants, if they severally make a complete sentence, or are found in different parts of the same deed (*p*); but if the whole stands in the same sentence it may be held to be one entire covenant (*p*). Where the covenants are independent, the right of entry attaches for breach of the general covenant though no notice has been given under the special covenant (*q*).

General
covenant and
covenant to
repair on
notice.

Where the lessor has a remedy for recovering the expenses of repairing, and elects to do the repairs himself, he waives the forfeiture under the general covenant (*t*), and after such repairs he cannot recover on the general covenant inasmuch as the premises are not out of repair at the time of bringing the action, nor on the special covenant if no proper notice has been given (*t*). Hence mesne lessees who repair to avoid a forfeiture may find themselves without remedy against the sub-lessees (*u*).

A covenant to repair during the term after notice, and to leave in repair at the end of the term, constitutes distinct liabilities, and notice is not necessary to sustain an action for non-repair at the end of the term (*x*).

(*l*) *City of London v. Nash*, 1747, 3 Atk. 512.

(*m*) *Low v. Innes*, 1864, 4 D. J. & S. 286.

(*n*) *Evelyn v. Ruddish*, 1817, 7 Taunt. 411.

(*o*) The notice may be suspended by the pendency of negotiations between the parties: *Hughes v. Metrop. Ry. Co.*, 1877, 2 A. C. 439. See *Doe v. Brindley*, 1832, 4 B. & Ad. 84.

(*p*) Judgment in *Horsefall v. Testar*, 1817, 7 Taunt. 385, at p. 388.

(*q*) *Baylis v. Le Gros*, 1858, 4 C. B. N. S. 537; and as to the effect of notice under the special covenant in waiving the forfeiture for breach of the general covenant, see *infra*, p. 470.

(*t*) *Doe v. Lewis*, 1836, 5 A. & E. 277.

(*u*) *Williams v. Williams*, 1874, L. R. 9 C. P. 659.

(*x*) *Harslet v. Butcher*, 1623, Cro. Jac. 644.

Conditional
covenants to
repair.

A covenant by the lessee to repair is sometimes made conditional on the performance of some act by the lessor ; as, for instance, on his first putting the premises into repair (*y*) ; but it may be a question whether it is a single conditional covenant, or whether there are independent covenants by the lessee and lessor respectively. Where the tenant covenants to keep in repair the demised premises, the same being first put into repair by the landlord (*z*), or the landlord allowing timber (*a*), the repair or allowance of timber by the landlord is a condition precedent ; though similar words have been held to raise an independent covenant on the part of the lessor to put premises into repair on which the tenant can sue (*b*).

Where the covenant is conditional, the lessee is not liable for the non-repair of any part of the premises until the lessor has entirely performed his condition (*c*), though, if the condition is for the supply of material, it is sufficient that the lessor is ready to supply the material when required (*d*). A covenant by the tenant to repair, "having or taking sufficient house-bote, hedge-bote, &c., for the doing thereof, without committing any waste or spoil," is an absolute covenant to repair free from condition precedent that there shall be a sufficient supply of that kind of timber on the premises (*e*). And where the tenant agrees to keep farm buildings in repair, and the landlord by a separate clause agrees, on notice from the tenant, to find materials, the tenant must repair and, if necessary, sue the landlord on his covenant. Hence the tenant cannot get damages from the landlord for injury to his goods due to the non-repair of the roof (*f*).

Approval of
surveyor.

Where the tenant is to expend money on improvements to the approbation of a surveyor to be named by the landlord, the appointment of a surveyor is a condition precedent

(*y*) *Slater v. Stone*, 1623, Cro. Jac. 645.

(*z*) *Neale v. Ratcliffe*, 1850, 15 Q. B. 916.

(*a*) *Thomas v. Cadwallader*, 1744, Willes, 496 ; though see *Mucklestone v. Thomas*, 1739, Willes, 146. (*b*) *Cannock v. Jones*, 1849, 3 Ex. 233.

(*c*) *Neale v. Ratcliffe*, 1850, 15 Q. B. 916 ; *Cannock v. Jones*, 1849, 3 Ex. 233. See *Counter v. Macpherson*, 1845, 5 Moore, P. C. C. 83 ;

Coward v. Gregory, 1866, L. R. 2 C. P. 153.

(*d*) *Martyn v. Clue*, 1852, 18 Q. B. 661.

(*e*) *Dean and Chapter of Bristol v. Jones*, 1859, 1 E. & E. 484.

(*f*) *Tucker v. Linger*, 1882, 21 C. D. 18.

to the tenant's liability (*g*); and similarly with respect to the completion of houses (*h*). But although the surveyor is not satisfied, it is no forfeiture if in the opinion of those who try the cause he ought to have been satisfied (*i*). Where, however, the lessee is to retain out of his rent the cost of improvements to be done in a substantial manner and to the approval of the lessor, such approval is not a condition precedent to the right to retain the rent (*j*). Where the lessee covenants to do certain work which is to be left to the superintendence of named persons, the covenant is absolute, the specified superintendence not being a condition precedent or concurrent (*k*).

The liability of the lessee upon a covenant to repair commences only from the execution of the lease by the lessor. He is not liable for acts done before the time of the execution of the lease, although the *habendum* of the lease states the premises to be held from a day prior to its execution (*l*).

Commence-
ment of
lessee's
liability.

CONSTRUCTION OF SPECIAL AGREEMENTS RELATING TO REPAIRS.

COVENANT by lessee to keep in repair the premises and all erections, buildings and improvements erected thereon during the term, and yield up the same in good repair. The lessee cannot remove a verandah erected by him, the lower part of which is attached to posts fixed in the ground (*m*).

COVENANT by lessee of a farm well and substantially to repair and keep in good substantial repair, and so well and substantially repaired to yield up at the end of the term. The tenant is bound to give up the premises in as good a state of repair as they were in when he took possession, and they must be inferred to have been then in a tenantable state (*n*).

AGREEMENT by tenant to leave a farm in as good condition

(*g*) *Coombe v. Green*, 1843, 11 M. & W. 480.

(*h*) *Hunt v. Bishop*, 1853, 8 Ex. 675.

(*i*) *Doe v. Baker*, 1848, 2 C. & K. 743.

(*j*) *Dallman v. King*, 1837, 4 Bing. N. C. 105.

(*k*) *Cannock v. Jones*, 1849, 3 Ex. 233 ; 5 Ex. 713 ; 3 H. L. C. 700.

(*l*) *Shaw v. Kay*, 1847, 1 Ex. 412.

(*m*) *Penry v. Brown*, 1818, 2 Stark. 403.

(*n*) *Brown v. Trumper*, 1858, 26 Beav. 11, 15.

as he found it. Is an agreement to leave it in tenantable repair if he found it so(o).

COVENANT *by lessee of coal mine at the end of the term to yield up the works and mines, and all ways and roads, in such good repair, order and condition, that the works may be continued and carried on by the lessor.* Does not extend to movable chattels, such as iron tram-plates fastened to wooden sleepers not let into the ground (p).

COVENANT *by lessee of farm to repair and leave in good repair all buildings to be erected thereon during the term.* Extends to a farm-house erected during the term by permission of the lessor, who is lord of the manor, on the waste adjoining the demised premises (q).

COVENANT *by lessor of a house to repair and keep in repair all the external parts of the demised premises.* A partition wall dividing the demised house from an adjoining house is an external part of the premises within this covenant (r).

COVENANT *by lessee of farm and cottages to keep and uphold and maintain the premises in good and tenantable position, and give them up in such repair.* Lessee is bound to keep up the cottages *in situ*, and to repair if ruinous, so as to keep them in the same condition as at the time of demise, provided it was a tenantable condition. If they are pulled down, he is liable for their value as they stood, without reference to the general improvement of the farm by their removal (s).

COVENANT *by lessor that, in case the demised premises shall be burned down, he will "rebuild and replace" the same in the same state as they were in before the fire.* The lessor is only bound to restore the premises to

(o) *Winn v. White*, 1773, 2 W. Bl. 840. And furniture let upon similar terms, if clean, must be left clean: *Stanley v. Agnew*, 1844, 12 M. & W. 827.

(p) *Beaufort v. Bates*, 1862, 3 D. F. & J. 381.

(q) *White v. Wakley*, 1858, 26 Beav. 17.

(r) *Green v. Eales*, 1841, 2 Q. B. 225. And as to covenant by lessor to repair, subject to certain expenses being borne by the tenant, see *Beer v. Sauter*, 1861, 10 C. B. N. S. 435.

(s) *Woolcock v. Dew*, 1858, 1 F. & F. 337.

the state in which they were when he let them, and is not obliged to rebuild an additional story subsequently erected by the tenant (*t*).

COVENANT by lessee as often as necessary well and sufficiently to repair, paint, and cleanse the demised premises, and keep and leave the same in such repair, reasonable wear and tear excepted. If the lessee has repaired a reasonable time before leaving, he is only bound in addition to repair actual dilapidations and to cleanse the old paint, but is not bound to repaint (*u*).

Where the lessor has covenanted to repair a part of the premises the condition of which he cannot readily ascertain without entry—as the main timbers or roof—the lessee cannot charge him with breach unless notice of the want of repair has been given (*x*). And similarly as to drains, where the lessor has no means of knowing a defect and the lessee has (*y*).

Notice to
lessor to
repair.

Where a lessee covenanted to bear a proportion of the expense of putting and keeping roads in order, it was held that he was not liable if the lessor in repairing changed the character of the road, as from a flint road to a macadamized road (*z*).

Repair at
joint expense
of lessor and
lessee.

A landlord cannot lawfully enter upon his tenant's premises to execute repairs unless some express stipulation to that effect has been made (*a*), even though he is a termor and liable to forfeiture under the superior lease, and though he has the consent of the sub-tenants (*b*); and his entry will be restrained by injunction (*b*). But where the lessor has covenanted to repair, this implies a licence by the tenant for him to enter for a reasonable time to do the repairs (*c*).

Entry by
landlord to
repair.

A provision in a lease that the landlord may enter the demised house “at convenient times” to view the state of

Entry to view
state of repair.

(*t*) *Loader v. Kemp*, 1826, 2 C. & P. 375.

(*u*) *Scales v. Lawrence*, 1860, 2 F. & F. 289.

(*x*) *Makin v. Watkinson*, 1870, L. R. 6 Ex. 25; *L. & S. W. Ry. Co. v. Flower*, 1875, 1 C. P. D. p. 85; *Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507. See per Mansfield, C.J., in *Moore v. Clark*, 1813, 5 Taunt. p. 96. (*y*) *Hugall v. M'Lean*, 1885, 53 L. T. 94.

(*z*) *Mayor of London v. Burnes*, 1896, 12 T. L. R. 135.

(*a*) *Barker v. Barker*, 1829, 3 C. & P. 557.

(*b*) *Stocker v. Planet Building Society*, 1879, 27 W. R. 877.

(*c*) *Saner v. Bilton*, 1878, 7 C. D. 815.

repair is not contravened by his being excluded from some of the rooms if he has given no notice of his coming (*d*).

No specific performance.

A tenant cannot be compelled to specific performance of a covenant to repair (*e*).

Measure of damages for breach of covenant.

i. During currency of term.

If the lessor sues during the currency of the term for breach of the covenant to repair (*f*), it has been held that the damages are not the amount which would be required to put the premises into repair, but the amount to which the saleable value of the reversion is injured by the non-repair of the premises (*g*), and the claim ought to show the term for which the premises are demised (*h*). No hard and fast rule, however, can be laid down as to the damages recoverable in such a case. All the circumstances must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the lessor has sustained by reason of the breach of covenant (*i*). Hence, where a sub-lessor is suing a sub-lessee who took with notice of the original lease, it is proper to take into account the liability of the sub-lessor under the covenants in such lease (*i*). Where the landlord, with the consent of the tenant, does the repairs himself, he can recover the amount he has reasonably spent, notwithstanding that, owing to subsequent events, it turns out that the repairs were useless (*k*).

ii. After expiration of term.

But where the term has expired, and the lessor is suing on the covenant to yield up the premises in repair, the measure of damages is the cost of putting the premises into the state of repair in which they ought to have been left (*l*); and this result is not affected by the circumstance that the lessor, by reason of the terms of a fresh lease granted

(*d*) *Doe v. Bird*, 1833, 6 C. & P. 195.

(*e*) *Hill v. Barclay*, 1810, 16 Ves. p. 405.

(*f*) As to damages where the lessor recovers the land for breach of a building agreement and lets again, see *Oldershaw v. Holt*, 1840, 12 A. & E. 590; *Marshall v. Mackintosh*, 1898, 46 W. R. 580.

(*g*) *Smith v. Peat*, 1853, 9 Ex. 161. See *Doe v. Rowlands*, 1840, 9 C. & P. 734; *Mills v. East London Union*, 1872, L. R. 8 C. P. 79; *Henderson v. Thorn*, 1893, 2 Q. B. 164. The contrary opinion expressed by Lord Holt in *Vivian v. Champion*, 1705, 2 Ld. Raym. 1125, 1 Salk. 141, has not been followed. (*h*) *Turner v. Lamb*, 1845, 14 M. & W. 412.

(*i*) *Conquest v. Ebbetts*, 1896, A. C. 490, per Lord Herschell, p. 494. See *Ebbetts v. Conquest*, 1895, 2 Ch. 377.

(*k*) *Colley v. Streeton*, 1823, 2 B. & C. 273.

(*l*) *Joyner v. Weeks*, 1891, 2 Q. B. 31.

to another lessee, does not in fact require to have the repairs done (*m*); or that he is himself effecting structural alterations in the premises (*n*); or that, by reason of change in the surrounding property, the house will be as valuable for letting if some of the repairs required by the covenant are omitted or done at a cheaper rate (*o*).

Ordinarily the measure of damages for breach of a covenant to do a specific act, as to build a wall, is not the cost of performance, but the pecuniary difference which non-performance makes to the covenantee (*p*).

The landlord may recover, in addition to the amount of the actual expense of the repairs, a compensation for the loss of the use of the premises while they are undergoing repair (*q*). But it seems that this rule does not apply in favour of the lessee, and where the lessor neglects an obligation to repair, the lessee cannot recover the expenses of other premises to which he removes while he is having the repairs done (*r*).

An action for breach of covenant to repair is an action in which a contract or liability affecting land is sought to be enforced, and the writ may be served out of the jurisdiction if the premises are within the jurisdiction (*s*).

Rent during repairs.

Action for breach of covenant.

SECT. III.—WASTE.

	PAGE
(1) Voluntary	323
Trees	324
Mines	325
Meliorating waste	326
(2) Permissive	328
(3) Remedies for	329

(1) VOLUNTARY WASTE.

There are two kinds of waste,—voluntary or actual, and permissive (*t*). A tenant commits voluntary waste by acts

(*m*) *Joyner v. Weeks*, 1891, 2 Q. B. 31; *Racclings v. Morgan*, 1855, 18 C. B. N. S. 776. (*n*) *Inderwick v. Leech*, 1884, C. & E. 412.

(*o*) *Morgan v. Hardy*, 1886, 17 Q. B. D. 770.

(*p*) *Wigzell v. School for Blind*, 1882, 8 Q. B. D. 357.

(*q*) *Woods v. Pope*, 1835, 6 C. & P. 782. See 1 Bing. N. C. 467; *Birch v. Clifford*, 1891, 8 T. L. R. 103.

(*r*) *Green v. Eales*, 1841, 2 Q. B. 225.

(*s*) *Tassell v. Hallen*, 1892, 1 Q. B. 321; R. S. C. Ord. 11, r. 1 (b). As to pleading a breach of a covenant to repair, see *Wright v. Goddard*, 1838, 8 A. & E. 144.

(*t*) Co. Litt. 53 a.

1. Acts of destruction.

of destruction, such as pulling down houses, or removing wainscots, doors or windows, furnaces, or the like, which have been annexed or fixed to the house, whether by himself or by the landlord (*u*). The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste (*v*). But no use of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste (*x*). Hence the tenant is not liable for waste if a building breaks down in the course of reasonable use; and any use is reasonable if it is for a purpose for which the property was intended to be used, and if the mode and extent of the user were apparently proper, having regard to the nature of the property, and to what the tenant knew or ought, as an ordinary business man, to have known of it (*y*). If the user of the property is expressly sanctioned by the lessor, there can be no question of waste (*z*); nor, it seems, is the tenant in such a case liable (at least to the extent of incurring a forfeiture for the waste), even though he fails to take the steps he has engaged to take to avoid damage through the waste (*a*).

Trees, &c.

Waste is committed by cutting down, destroying, or topping timber trees—that is, oak, ash, and elm (*b*) twenty years old (*c*), and such other trees—*e.g.* beech—as by special custom are counted timber (*d*). The age at which trees become timber may be varied by custom (*e*). The cutting of other trees is waste only when they afford shelter to the house, or serve some special purpose, as, in the case of willows sometimes, supporting the bank of a stream against the water (*f*).

(*u*) See note (*t*), p. 323; *Edge v. Pemberton*, 1843, 12 M. & W. 187.

(*v*) *Buckland v. Butterfield*, 1820, 2 Br. & B. 54, 58.

(*x*) *Saner v. Bilton*, 1878, 7 C. D. 815, 821.

(*y*) *Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507, 512.

(*z*) *Mew v. Cobby*, 1892, 2 Ch. p. 262.

(*a*) *Doe v. Morris*, 1809, 2 Taunt. 52.

(*b*) Co. Litt. 53 a.

(*c*) *Aubrey v. Fisher*, 1809, 10 East, 446; *Dunn v. Bryan*, 1872, Ir. R. 7 Eq. 143.

(*d*) *Aubrey v. Fisher*, *supra*; *Honywood v. Honypwood*, 1874, 18 Eq. 306, 309; *Dashwood v. Magniac*, 1891, 3 Ch. 306.

(*e*) *Honywood v. Honypwood*, *supra*.

(*f*) Co. Litt. 53 a; *Phillipps v. Smith*, 1845, 14 M. & W. 589; *Dunn v. Bryan*, *supra*.

But the cutting of trees which are not timber trees, and of timber trees under twenty years' growth (*g*), and of underwood generally, must be done in a seasonable manner, and so as not to prevent the trees or underwood from growing again (*h*). If the tenant is going to graze cattle in fields containing young trees and shrubs, he ought to tell the landlord, so that he may protect them by fences (*i*).

It is waste to destroy a quickset hedge of whitethorn (*k*) ; or to plough up strawberry beds in full bearing (*l*).

Waste can only be committed of the thing demised ; hence, cutting down trees excepted out of a demise is not waste (*m*). On the other hand, it has been held that the tenant is not liable in trespass for damage done by his cattle to trees excepted out of the demise (*n*).

Under a lease of land by an owner in fee, not mentioning mines, the lessee may work and take the profits of mines which are open at the time of making the lease (*o*), provided the reversioner has already commenced working them with a view to profit (*p*) ; and in this respect there is no difference between mines and quarries (*p*). But digging for stone or slate for the purpose of building or repairing houses on the property is not an opening of the quarry for the purpose of profit within the meaning of this rule (*q*). When the mine or quarry is once open in this sense, the sinking of a new pit in the same vein, or breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or quarry (*r*).

Mines.

i. Where lease does not mention mines.

Only mines open at time of demise may be worked.

(*g*) *Phillipps v. Smith*, 1845, 14 M. & W. 589 ; *Dunn v. Bryan*, 1872, Ir. R. 7 Eq. 143.

(*h*) Co. Litt. 53 a ; *Phillipps v. Smith*, *supra* ; *Gage v. Smith*, 1614, Godb. 209 ; *Dunn v. Bryan*, *supra*.

(*i*) *Fowler v. Johnstone*, 1892, 8 T. L. R. 327.

(*k*) Co. Litt. 53 a.

(*l*) *Watherell v. Howells*, 1808, 1 Camp. 227.

(*m*) *Goodright v. Vivian*, 1807, 8 East, 190, 192.

(*n*) *Glenkam v. Hanby*, 1701, 1 Ld. Raym. 739. But see *Fowler v. Johnstone*, *supra*.

(*o*) Co. Litt. 54 b ; *Saunders' Case*, 1598, 5 Rep. 12 a ; *Astry v. Ballard*, 1678, 2 Mod. 193 ; judgment in *Clegg v. Rowland*, 1866, L. R. 2 Eq. at p. 165.

(*p*) *Elias v. Griffith*, 1878, 8 C. D. 521 ; on appeal, *sub nom. Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 454.

(*q*) *Elias v. Griffith*, 8 C. D. p. 532.

(*r*) *Elias v. Snowdon Slate Quarries Co.*, 1879, 4 App. Cas. 454 ; judgment of Lord Selborne, p. 466.

Where no mines or quarries are open, it is waste for the lessee to dig for gravel, clay, stone, or the like; or for metals or coal (*s*). Though if the lease is without impeachment of waste, while he cannot, as by digging clay for bricks, destroy the land, he may, it seems, open new mines (*t*).

Unless lease is without impeachment of waste.

ii. Where lease includes mines.

If the lease includes mines, and there is one mine open, the lessee can only work that mine (*u*); but if all the mines are unopened, he may open and work any of them (*x*).

Repairs, &c.

The lessee may dig for gravel or clay for the reparation of the house demised, and for the same purpose may take convenient timber-trees (*y*), though he may not cut down timber in anticipation to be used for repairs as occasion requires (*z*).

2. Changing nature of the demised premises.

It is also technically waste to change the nature of the thing demised (*a*); as, for instance, by demolishing an old building and erecting in place of it new buildings of greater value (*b*); or converting a corn-mill into a fulling-mill (*c*); or turning ancient meadow or pasture into arable land (*d*); or arable land into wood, or conversely (*e*); or inclosing and cultivating waste land included in the demise (*f*).

Meliorating waste.

But although the above acts are technically waste, they do not as a rule constitute actionable waste, unless they in fact cause injury to the reversion (*g*); nor, apart from

(*s*) Co. Litt. 53 b, 54 b; *Saunders' Case*, *supra*; *Darcy v. Askwith*, 1618, Hob. 234.

(*t*) *Bishop of London v. Web*, 1718, 1 P. Wms. 527; *MacSwinney on Mines*, 2nd ed. p. 68, note (1).

(*u*) Co. Litt. 54 b; *Clegg v. Rowland*, 1866, L. R. 2 Eq. p. 165.

(*v*) Co. Litt. 54 b; *Saunders' Case*, *supra*.

(*y*) Co. Litt. 53 b; *Simmons v. Norton*, 1831, 7 Bing. 640.

(*z*) *Gorges v. Stanfield*, 1698, Cro. Eliz. 593. As to the lessee's right to fell trees for the purpose of working mines and quarries, see *Darcy v. Askwith*, 1618, Hob. 234; *Doe v. Price*, 1849, 8 C. B. 894.

(*a*) *Darcy v. Askwith*, 1618, Hob. 234.

(*b*) *Cole v. Greene*, 1671, 1 Lev. 309; *S. C. sub nom. Cole v. Forth*, 1 Mod. 94; *London v. Greyne*, 1608, Cro. Jac. 182.

(*c*) *London v. Greyne*, *supra*.

(*d*) Co. Litt. 53 b; *Simmons v. Norton*, 1831, 7 Bing. at pp. 647—649.

(*e*) Co. Litt. 53 b. As to when land will be regarded as ancient pasture land, see *Goring v. Goring*, 1676, 3 Swanst. 661; *Murphy v. Daly*, 1860, 13 Ir. C. L. R. 239.

(*f*) *Queen's College v. Hallett*, 1811, 14 East, 489.

(*g*) See *Barret v. Barret*, 1628, Hetley, 35; *Doe v. E. of Burlington*, 1833, 5 B. & Ad. 507.

such injury, will they be a ground of forfeiture (*h*). Where the lessee improves the demised premises, as by converting storehouses into dwelling-houses of much greater value, this is said to be meliorating waste (*i*), and the Court will not in general interfere to restrain the alteration by injunction (*k*). So where the lessee erects a building without the consent of the lessor (*l*). The test of actionable waste is whether the alterations complained of constitute an injury to the inheritance (*l*). If they do not, it is no answer for the landlord to say that they benefit the tenant and put money into his pocket (*m*). Hence the tenant may remove and sell flints thrown up in the ordinary course of agriculture (*m*); and, on a farm near London, he may, it seems, convert the demised premises into a market garden and erect glass-houses thereon (*n*). And an injunction will not be granted where the acts are partly meliorative and partly trivial (*o*).

But the Court will restrain a tenant from pulling down a house and building another which the landlord dislikes, although it is an improvement (*p*), and will enforce a covenant against alterations (*q*), or against the making of new buildings or erections (*r*). The latter covenant may be violated by the erection of a permanent trellis-work (*s*), or by fixing hoardings for advertisements to the demised premises (*t*).

Every lessee of land is liable for all waste done on the land in lease, by whomsoever it may be committed, for it is presumed in law that the lessee may withstand it (*u*).

(*h*) *Doe v. Bird*, 1826, 5 B. & C. 855; *Doe v. E. of Burlington*, *supra*.

(*i*) See *Meux v. Copley*, 1892, 2 Ch. 253.

(*k*) *Doherty v. Allman*, 1878, 3 App. Cas. 709. Cf. *Re McIntosh and Pontypridd Improvements Co.*, 1891, 61 L. J. Q. B. 164.

(*l*) *Jones v. Chappell*, 1875, 20 Eq. 539.

(*m*) *Tucker v. Linger*, 1882, 21 C. D. 18, per Kay, J., p. 29.

(*n*) *Meux v. Copley*, 1892, 2 Ch. 253. See this case as to the effect of the Agricultural Holdings Act, 1883, on the doctrine of waste.

(*o*) *Grand Canal Co. v. McNamee*, 1891, 29 L. R. Ir. 131.

(*p*) *Smyth v. Carter*, 1853, 18 Beav. 78.

(*q*) *Perry v. Davis*, 1858, 3 C. B. N. S. 769.

(*r*) *Haigh v. Waterman*, 1867, 16 L. T. 375.

(*s*) *Wood v. Cooper*, 1894, 3 Ch. 671.

(*t*) *Pocock v. Gilham*, 1883, C. & E. 104.

(*u*) 2 Wms. Saund. ed. 1871, p. 658, note (*m*). See *Attersoll v. Stevens*, 1808, 1 Taunt. p. 196.

Tenant at will.

If a tenant at will commits voluntary waste, this operates as a determination of the will, and trespass lies against him (*x*).

(2) PERMISSIVE WASTE.

Permissive waste consists in suffering houses to fall into decay through want of necessary repairs (*y*); but if a house was uncovered when the tenant came in, it is no waste in him to suffer it to fall down (*z*). It is not waste at common law, either wilful or permissive, to leave land uncultivated (*a*).

Tenants at will or from year to year not liable.

Tenants at will (*b*) and tenants from year to year (*c*) are not liable for permissive waste.

Tenant for years liable,

At common law no remedy for waste, either voluntary or permissive, lay against lessee for life or years (*d*), but by the Statute of Gloucester (*e*) a writ of waste was given against each class. Whether this included permissive waste has been the subject of controversy (*f*). At one time it was supposed that the liability for permissive waste had been established (*g*); but the doubt has been revived (*h*), and at present the illogical result appears to have been reached that tenants for years are liable (*i*), but not tenants for life (*k*).

but not tenants for life.

(*x*) *Countess of Shrewsbury's Case*, 1601, 5 Rep. 13 b.

(*y*) See *Herne v. Benbow*, 1813, 4 Taunt. 764. (*z*) Co. Litt. 53 a.

(*a*) Per Parke, B., in *Hutton v. Warren*, 1836, 1 M. & W. at p. 472.

(*b*) *Harnett v. Maitland*, 1847, 16 M. & W. 257; *Countess of Shrewsbury's Case*, 1601, 5 Rep. 13 b; *Panton v. Isham*, 1693, 3 Lev. 359 (no action for negligently keeping fire).

(*c*) *Torriano v. Young*, 1833, 6 C. & P. 8. See *Martin v. Gilham*, 1837, 7 A. & E. 540.

(*d*) *Countess of Shrewsbury's Case*, *supra*; *Woodhouse v. Walker*, 1880, 5 Q. B. D. p. 406.

(*e*) 6 Ed. 1, c. 5 (repealed, 42 & 43 Vict. c. 59); and see Stat. of Marlbridge, 52 Hen. 3, c. 23.

(*f*) See *Jones v. Hill*, 1817, 7 Taunt. 392.

(*g*) *Harnett v. Maitland*, 1847, 16 M. & W. 257; *Yellowley v. Gower*, 1855, 11 Ex. at p. 294; 2 Wms. Saund. ed. 1871, p. 646, note (*c*).

(*h*) *Woodhouse v. Walker*, 1880, 5 Q. B. D. 404.

(*i*) *Davies v. Davies*, 1888, 38 C. D. 499.

(*k*) *Re Cartwright, Aris v. Newman*, 1889, 41 C. D. 532. See *Powys v. Blagrove*, 1854, 4 D. M. & G. 448; *Barnes v. Dowling*, 1881, 44 L. T. 809. As to the liability of the legatee for life of a leasehold house to pay the rent and perform the covenants, see *Re Betty*, 1899, 1 Ch. 821, and *Re Gijers*, 1899, 2 Ch. 54, overruling *Re Tomlinson*, 1898, 1 Ch. 232.

(3) REMEDY FOR WASTE.

The remedy for waste is by action to recover damages for the waste, or by injunction to prevent the commission of threatened waste, or the continuance or repetition of waste already committed.

In an action for waste the measure of damages is not necessarily the sum required to restore the property; it is the diminution in the value of the reversionary interest, less an allowance for discount for immediate payment (*l*). Although by the act of waste, as the opening of a new door, the house is not weakened or injured, the jury must still be asked whether there was any injury to the reversionary estate (*m*). If the jury give only nominal damages, judgment may, it seems, be entered for the defendant (*n*). The action lies either during or after the expiration of the term (*o*), and although the injury might be the subject of an action for breach of express covenant (*p*). And it lies against the tenant for acts done while he holds over after the expiration of notice to quit (*q*). Damages.

An injunction will be granted to restrain waste (*r*), provided the acts of waste are prejudicial to the inheritance (*s*). And an injunction will be granted at the suit of a superior landlord against an underlessee (*t*). Damages can be given for waste completed at the date of the action, and an injunction against further waste (*u*). Injunction.

(*l*) *Whitham v. Kershaw*, 1885, 16 Q. B. D. 613.

(*m*) *Young v. Spencer*, 1829, 10 B. & C. 145.

(*n*) *Harrow School v. Alderton*, 1800, 2 B. & P. 86, an action on the Stat. of Gloucester.

(*o*) *Kinlyside v. Thornton*, 1776, 2 W. Bl. 1111.

(*p*) *Kinlyside v. Thornton*, *supra*; *Marker v. Kenrick*, 1853, 13 C. B. 188.

(*q*) *Burchell v. Hornsby*, 1808, 1 Camp. 360.

(*r*) *Kimpton v. Eve*, 1813, 2 Ves. & B. 349. See *Mayor of London v. Hedger*, 1811, 18 Ves. 355; and for a case of wilful injury, *Pratt v. Brett*, 1817, 2 Madd. 62.

(*s*) *Meux v. Cobley*, 1892, 2 Ch. 253; *supra*, p. 327.

(*t*) *Farrant v. Lovel*, 1750, 3 Atk. 723.

(*u*) *Hindley v. Emery*, 1865, 1 Eq. 52. As to damages in lieu of an injunction, see *Annual Practice*, 1900, p. 673, notes to R. S. C. Ord. 50, r. 6.

SECT. IV.—MODE OF USING PREMISES.

	PAGE
(1) Where there is no express agreement	330
Illegal purposes	330
Fitness of premises for use intended	331
(2) Where there is an express agreement	333
Construction of contracts—	333
Relating to exercise of trade generally	333
„ particular trades	334
„ matters causing annoyance	336
„ use as private residence	338
„ forfeiture of licences	339
„ trading with particular persons	339
„ working of mines	341
Enforcing covenants	343

(1) WHERE THERE IS NO EXPRESS AGREEMENT.

Illegal purposes.

No legal demand can arise out of a contract based upon an illegal or immoral consideration. Hence rent or damages for breach of covenant are not recoverable under leases of houses used for purposes of prostitution; provided the lessor is aware that the premises are to be so used (*v*). And although the house is not originally let for this purpose, rent is not recoverable if the lessor with full knowledge suffers the tenancy to go on after he has had the opportunity of terminating it (*x*). Similarly if the premises are used for the purpose of boiling oil or tar contrary to 25 Geo. 3, c. 77 (*y*).

As every right or obligation arising out of the contract is tainted by the immorality of the transaction, the lessee cannot recover from his assignee, under a covenant in the assignment for indemnity in respect of all the lessee's covenants, a sum which the lessor has compelled the lessee to pay for dilapidations (*z*).

In an action for breach of a contract to let premises, the defendant may justify such breach by proving that the plaintiff intended to use the premises for an illegal purpose,

(*v*) *Girardy v. Richardson*, 1793, 1 Esp. 13; *Crisp v. Churchill*, 1794, cited in *Lloyd v. Johnson*, 1 B. & P. 340; *Appleton v. Campbell*, 1826, 2 C. & P. 347. And so generally where the agreement under which the rent is due is illegal: *Gibbons v. Chambers*, 1885, C. & E. 577.

(*x*) *Jennings v. Throgmorton*, 1825, Ry. & M. 251, a case of a weekly tenancy. (*y*) *Smith v. White*, 1866, 1 Eq. 626.

(*z*) *Gas Light Co. v. Turner*, 1840, 6 Bing. N. C. 324. See *Flight v. Clarke*, 1844, 13 M. & W. 155.

although at the time of refusing to perform the contract he did not assign such intended use as a reason for his refusal (*a*). After the lessee has entered into possession under a lease, however, the lessor cannot avoid such lease, on the ground that it was obtained by the fraudulent misrepresentations of the lessee as to matters collateral to the lease; as, for instance, that he intended to use the demised premises for a respectable business, whereas he used them for an immoral purpose (*b*).

Where premises are let with a right of access by a way over which the lessor has control, and the lessor suspects that the lessee is intending to use them for an unlawful purpose, he should apply for an injunction and not take the law into his own hands by interfering with the right of access (*c*).

There is no contract implied by law on the part of the lessor of an unfurnished house, that it is in a reasonably fit state for occupation, although it is let for the purpose of immediate habitation (*d*). The owner of a house is not bound to disclose to an intending lessee that it is in a ruinous state and dangerous to occupy, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it (*e*). In the absence of express warranty or active deceit, no action will lie against the owner for not making this disclosure (*e*). It has been said, however, that the contract cannot be enforced if the house is dangerous through disease or drainage, or uninhabitable through vermin (*f*).

Where a verbal statement as to the sanitary condition of a house, or as to its being well built, is made prior to or at the date of a lease in writing, the lessee cannot recover damages if the statement turns out to be untrue (*g*), save

Fitness of premises for use intended.
1. On demise of unfurnished house.

Representation as to fitness.

(*a*) *Cowan v. Milbourn*, 1867, L. R. 2 Ex. 230.

(*b*) *Feret v. Hill*, 1854, 15 C. B. 207.

(*c*) *Lilley v. Bennett*, 1888, 5 T. L. R. 156.

(*d*) *Hart v. Windsor*, 1843, 12 M. & W. 68. But under Sect. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), upon the letting for habitation by persons of the working classes a house or part of a house, there is an implied condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. (*e*) *Keates v. Cauloghan*, 1851, 10 C. B. 591.

(*f*) Per Bacon, V.-C., in *Powell v. Chester*, 1885, 52 L. T. 722.

(*g*) *Kennard v. Ashman*, 1894, 10 T. L. R. 213, see p. 447; *Green v. Symons*, 1897, 13 *ib.* 301.

only in an action of deceit; but for this purpose the statement must have been made either fraudulently or recklessly (*h*). And where there is a lease, the lessee is restricted to the lease, and cannot rely upon a warranty even in writing, unless under circumstances of fraud (*i*). If, however, the statement is made in connection with a verbal contract, and for the purposes of the contract, it is a part of the contract, and operates as a warranty. Hence, if it is not true, and the lessee leaves within a reasonable time, he is not liable on the contract (*k*).

2. On demise
of furnished
house.

It has been held, that upon the demise of a furnished house, since the bargain is not so much for the house as the furniture, there is an implied condition that it shall be reasonably fit for immediate habitation (*l*). It is a breach of this condition, whether express or implied, if the house, or any of the rooms, are infested and overrun with vermin; but to justify the tenant in quitting without notice, it must appear that the nuisance existed to a serious and substantial extent, and was such as he could not reasonably be expected either to endure or to extirpate (*m*).

The implied condition as to the fitness of a furnished house for occupation applies only to the condition of the premises at the commencement of the tenancy (*n*); and it is not enough that the landlord should honestly believe it to be in a fit state. It must in fact be reasonably habitable (*o*). If it is not so, the lessee may within a reasonable time rescind the contract (*p*).

(*h*) *Saunders v. Pawley*, 1886, 2 T. L. R. 590; *Bartram v. Aldous*, 1886, 2 T. L. R. 237; *Butler v. Goundry*, 1888, 4 T. L. R. 711. See *Derry v. Peck*, 1889, 14 App. Cas. 337.

(*i*) *Longman v. Blount*, 1896, 12 T. L. R. 520.

(*k*) *Bunn v. Harrison*, 1886, 3 T. L. R. 146.

(*l*) *Smith v. Marrable*, 1843, 11 M. & W. 5; *Wilson v. Finch Hatton*, 1877, 2 Ex. D. 336. See *Sutton v. Temple*, 1843, 12 M. & W. p. 65; *Hart v. Windsor*, 12 M. & W. p. 87; *Harrison v. Malet*, 1886, 3 T. L. R. 58; *Bird v. Lord Greville*, 1884, C. & E. 317. In *Powell v. Chester*, 1885, 52 L. T. 722, Bacon, V.-C., considered *Smith v. Marrable* to be an authority only as to taking furnished apartments at the seaside, or for temporary occupation, but this seems to be erroneous.

(*m*) *Campbell v. Wenlock*, 1866, 4 F. & F. 716.

(*n*) *Sarson v. Roberts*, 1895, 2 Q. B. 395; *Maclean v. Currie*, 1884, C. & E. 361. See *Wilson v. Finch Hatton*, *supra*; *Dawson v. Clementson*, 1885, 1 T. L. R. 295.

(*o*) *Charsley v. Jones*, 1889, 53 J. P. 280.

(*p*) *Wilson v. Finch Hatton*, *supra*.

On a demise of land, or the vesture of land, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken (*q*). Nor in a lease of land for agricultural purposes is there an implied warranty by the lessor that no noxious plants are growing on it (*r*).

3. On demise of land.

(2) WHERE THERE IS AN EXPRESS AGREEMENT.

Premises can in general be used for purposes other than those originally contemplated, provided a specific covenant is not broken (*s*), and provided there is no fraud on the lessor (*t*). If, however, land is let for a specified purpose, an injunction will be granted to restrain its use for other purposes (*u*).

Contracts whereby a person is restricted generally, and without reference to place, from exercising his trade, although for a limited time, were formerly held to be void (*r*). Covenants restraining a lessee or lessor from carrying on a specified trade within a particular area were valid, provided they were reasonable, having regard to the subject-matter of the contract (*y*). But now the contract is not necessarily void because unlimited in point of space, and the test of the validity of the restriction is whether it is reasonably required for the protection of the covenantee, and is not injurious to public interests (*z*).

Construction of contracts relating to exercise of trades.

COVENANT not to exercise any trade or business. The word "trade" is applicable only to a business conducted by buying and selling, and does not extend to the

Against trade generally.

(*q*) *Sutton v. Temple*, 1843, 12 M. & W. 52.

(*r*) *Erskine v. Adeane*, 1873, 8 Ch. 756.

(*s*) *Grand Canal Co. v. M'Namee*, 1891, 29 L. R. Ir. 131.

(*t*) *Bennett v. Sautler*, 1808, 14 Ves. 256.

(*u*) *Kehoe v. M. of Lansdowne*, 1893, A. C. 451. As to the intended use becoming impossible owing to a change in the law, see *Doe v. Rugeley*, 1844, 6 Q. B. 107.

(*x*) *Ward v. Byrne*, 1839, 5 M. & W. 548; *Hinde v. Gray*, 1840, 1 M. & Gr. 195, 203.

(*y*) *Mitchell v. Reynolds*, 1711, 1 P. Wms. 181; *Hitchcock v. Coker*, 1837, 6 A. & E. 438. See per Tindal, C.J., in *Horner v. Graves*, 1831, 7 Bing. at p. 743.

(*z*) *Nordenfelt v. Maxim-Nordenfelt Co.*, 1894, A. C. 535. See *Leather Cloth Co. v. Lonsont*, 1869, 9 Eq. p. 354; *Rousillon v. Rousillon*, 1880 14 C. D. 351; *Davies v. Davies*, 1887, 36 C. D. 359.

keeping of a private lunatic asylum (*a*). The occupation of a schoolmaster is a business within the meaning of this covenant (*b*). Payment, however, is not necessary to constitute a business; nor does it necessarily make a business (*c*). A charitable institution called a "Home for Working Girls," where the inmates were provided without payment with board and lodging, was held to be a business—that is, practically, the business of a lodging-house (*c*); and the user of premises as a throat and chest hospital for poor persons, who make small payments according to their means, is a business (*d*).

The covenantee does not waive the benefit of the covenant by permitting another house held under the like covenant to be used as a school (*e*). Under a covenant not to use premises for certain purposes, there is a new breach every day during the time the premises are so used (*f*).

COVENANT *not to affix or permit any outward mark or show of business to be affixed on the demised premises*. It is a breach to place on wire blinds and on a brass plate the name of a firm carrying on business on the premises (*g*).

COVENANT in a lease of a house against the user of the house for any *art, trade, or business*. Teaching music is a breach (*h*).

Particular
trades (*i*).

COVENANT *not to use a house as a coffee-house*. Lessees who are dealers in tea, coffee, and other groceries cannot sell light refreshments, such as tea, coffee, and sandwiches, for the convenience of customers (*k*).

(*a*) *Doe v. Bird*, 1834, 2 A. & E. 161.

(*b*) *Doe v. Keeling*, 1813, 1 M. & S. 95, 99; *Kemp v. Sober*, 1851, 1 Sim. N. S. 517; *Wickenden v. Webster*, 1856, 6 E. & B. 387; *Johnstone v. Hall*, 1856, 2 K. & J. 414; *Wauton v. Coppard*, 1899, 1 Ch. 92.

(*c*) *Rolls v. Miller*, 1884, 27 C. D. 71.

(*d*) *Bramwell v. Lacy*, 1879, 10 C. D. 691; or providing medical requisites, though not for profit: *Portman v. Home Hospital Association*, 1884, 27 C. D. 81 (note).

(*e*) *Kemp v. Sober*, 1851, 1 Sim. N. S. 517.

(*f*) Judgment in *Doe v. Woodbridge*, 1829, 9 B. & C. at p. 378.

(*g*) *Evans v. Davis*, 1878, 10 C. D. 747.

(*h*) *Tritton v. Bankart*, 1887, 56 L. T. 306.

(*i*) As to effect of permission to carry on a particular trade, see *Macker v. Foundling Hospital*, 1813, 1 V. & B. 188; as to covenant to use an opera-house only for theatrical purposes, and that the lessee will use his best endeavours to improve the house, see *Croft v. Lumley*, 1857, 6 H. L. C. 672.

(*k*) *Fitz v. Res*, 1893, 1 Ch. 77.

COVENANT *not to carry on the business of a wholesale and retail confectioner.* It is no breach for a grocer and tea-dealer to sell a particular kind of sweetmeat in which a confectioner may deal (*l*). And, generally, where a particular trade is prohibited, the sale by a different class of trader of certain articles which form an essential part, but not nearly the whole, of the prohibited trade, is no breach (*m*).

COVENANT *not to exercise the trade of a butcher.* Is broken by selling raw meat by retail upon the premises, although no beasts are slaughtered there (*n*).

COVENANT *by the Postmaster-General to use premises as a post office for the district and not for any other purpose.* It is no breach for excise duties to be received and licences granted on the premises (*o*).

COVENANT *not to carry on a business similar to the specified business of another tenant of the same lessor.* The test is whether the businesses are sufficiently alike to compete (*p*).

Where a particular trade is prohibited, the partial exercise of the trade on the demised premises will operate as a breach of a covenant not to carry on such trade (*q*).

COVENANT *not to use a house as a "beerhouse" (r) or as a public-house for the sale of beer, &c.* Is not broken by the tenant's taking out an excise licence for the sale of beer not to be drunk on the premises (*s*).

Against use
as public-
house, &c.

COVENANT *not to use any building to be erected on the demised premises as a "public-house, tavern, or beer-shop."* Is broken by the tenant obtaining an off-licence authorizing him to sell at a shop on the

(*l*) *Lumley v. Metrop. Ry. Co.*, 1876, 34 L. T. 774.

(*m*) *Stuart v. Diplock*, 1889, 43 C. D. 343.

(*n*) *Doe v. Spry*, 1818, 1 B. & A. 617. See *Doe v. Elsam*, 1828, M. & M. 189.

(*o*) *Wadham v. Postmaster-General*, 1871, L. R. 6 Q. B. 644.

(*p*) *Drew v. Guy*, 1894, 3 Ch. 25.

(*q*) *Doe v. Spry*, 1818, 1 B. & A. 617, 619. See *Doe v. Elsam*, *supra*.

(*r*) *London & N. W. Ry. Co. v. Garnett*, 1869, L. R. 9 Eq. 26; *Holt & Co. v. Collyer*, 1881, 16 C. D. 718.

(*s*) *Pease v. Coates*, 1866, 2 Eq. 688. As to sale to members of a club, see *Ranken v. Hunt*, 1894, 10 R. 249.

demised land beer not to be drunk on the premises, and selling beer accordingly (t).

COVENANT, in deed executed in 1854, *not to carry on the trade or calling of hotel or tavern keeper, publican or beershop keeper, or seller by retail of wine, beer, spirits or spirituous liquors*. Is not broken by a grocer's selling, across the counter, wine and spirits by retail, in bottles only, such wine and spirits not to be consumed on the premises, under a licence granted under 24 & 25 Vict. c. 21, s. 2 (u).

COVENANT *not to carry on the "trade of an innkeeper, victualler, or retailer of wine, spirits or beer."* Is broken by the sale of these liquors at counters in the building, although only for the use of persons who pay for admission to a theatre adjoining (x).

COVENANT *against the use of a house as a "public-house or beershop."* An injunction will not be granted to restrain its use as a private hotel where wines and spirits are supplied only to visitors, and no beer at all is sold on the premises (y).

COVENANT *not to carry on the business of a common brewer or retailer of beer*. Carrying on the business of a retail brewer is not a breach (z).

Nuisance,
&c.

COVENANT *not to carry on any noisome or offensive trade*. Carrying on a dangerous trade is not a breach of this covenant (b). In construing the covenant, it is particularly worthy of consideration, whether the trade complained of was carried on upon the premises at the time of the demise (c), and apparently a trade carried on there at such time would not be prohibited (c). Lime-burning is a noisome business (d).

(t) *London & Suburban Land, &c. Co. v. Field*, 1881, 16 C. D. 645; *Nicoll v. Fenning*, 1881, 19 C. D. 258; *B. of St. Albans v. Battersby*, 1878, 3 Q. B. D. 359.

(u) *Jones v. Bone*, 1870, L. R. 9 Eq. 674. But in *Fielden v. Slater*, 1869, L. R. 7 Eq. 523, a similar covenant was held to prohibit the sale of spirituous liquors in bottles.

(x) *Buckle v. Fredericks*, 1890, 44 C. D. 244.

(y) *D. of Devonshire v. Simmons*, 1894, 11 T. L. R. 52.

(z) *Simons v. Farren*, 1834, 1 Bing. N. C. 126. As to "vintner," see *Wells v. Attenborough*, 1871, 24 L. T. 312, and as to sale of wine, see 23 & 24 Vict. c. 27, s. 44.

(b) *Hickman v. Isaacs*, 1861, 4 L. T. N. S. 285.

(c) *Gutteridge v. Munyard*, 1834, 7 C. & P. 129.

(d) *Wiltshire v. Cosslett*, 1889, 5 T. L. R. 410.

The carrying on of a fried fish business may be a breach of a covenant against offensive trade (*dd*), and so, possibly, may be the carrying on of a mock auction (*e*).

COVENANT *against causing a nuisance to the vendor of property or adjoining (ee) occupiers.* It has been held that the nuisance must be a legal nuisance in the technical sense (*f*)—but this has been doubted (*g*)—and that the covenant is not broken by the establishment of a national school (*f*).

COVENANT, in a building lease, *against any act which shall or may be or grow to the annoyance (h), nuisance, grievance or damage of the lessor or the inhabitants of the adjoining houses.* Is broken by the establishment of a hospital for the treatment of out-door patients suffering from diseases of the throat, &c. (*i*). Anything which disturbs the reasonable peace of mind of an adjoining occupier is an annoyance, though it may not amount to physical detriment to comfort (*k*). The covenant is broken by annoyance to inhabitants of adjoining houses, although not on the lessor's property (*g*).

COVENANT *not to do any act, &c., upon the demised premises which may lead to the damage, annoyance or disturbance of the lessor, or any of his tenants, or any part of the neighbourhood; followed by proviso for re-entry upon the carrying on of certain specified trades (not including*

(*dd*) *D. of Devonshire v. Brookshaw*, 1899, 43 Sol. Journ. 675.

(*e*) *Moses v. Taylor*, 1862, 11 W. R. 81.

(*ee*) As to the meaning of "adjoining" in a covenant by the lessor against a certain trade on adjoining premises, see *Vale v. Moorgate St. Buildings*, 1899, 80 L. T. 487.

(*f*) *Harrison v. Good*, 1871, L. R. 11 Eq. 338. See the definition of such a nuisance in *Walter v. Selfe*, 1841, 4 De G. & Sm. p. 322. But a boys' school is within a covenant against any trade or business or occupation whereby any injurious, offensive or disagreeable noise or nuisance shall be occasioned: *Wanton v. Coppard*, 1899, 1 Ch. 92. Cf. *Gresham Society v. Ranger*, 1899, 15 T. L. R. 454.

(*g*) *Tod-Heatly v. Benham*, 1888, 40 C. D. 80.

(*h*) See *Macher v. Foundling Hospital*, 1813, 1 V. & B. 188.

(*i*) *Tod-Heatly v. Benham*, 1888, 40 C. D. 80; *Bramwell v. Lacy*, 1879, 10 C. D. 691. A private hospital may fall within a covenant against carrying on an "offensive" business: *E. of Pembroke v. Warren*, 1896, 1 Ir. R. 76, 104.

(*k*) Per Bowen, L.J., in *Tod-Heatly v. Benham*, loc. cit. p. 98.

that of a licensed victualler), “or any other trade or business that may be, or grow, or lead to be offensive, or any annoyance or disturbance” to any of the lessor’s tenants. The opening of a public-house upon the premises is not a breach of the covenant or proviso (*m*). Nor in a business neighbourhood is such a covenant broken by putting up a prominent advertisement (*n*). But it is broken by the erection of a permanent trellis-work which interferes with the light to, and the pleasurable enjoyment of, adjoining premises (*o*).

COVENANT *against the use of premises so as to be a nuisance or otherwise than as a private club*. Is broken by boxing entertainments to which friends of the members are admitted by ticket (*p*).

COVENANT *that no building to be erected on certain land shall be used or occupied otherwise than as a private residence only and not for any purpose of trade*. The first part of the covenant is broken by the erection of a building for the education and lodging of one hundred girls in connection with a charitable institution for the daughters of missionaries (*q*); or by the use of a house as a boarding-house where pupils attending a school in the neighbourhood may be taken in as paying boarders (*r*).

COVENANT *to use house as a private dwelling-house only*. It seems that conversion into a shop may be effected by user, without any structural alterations of the house(s). It is a breach to use the house as an office for receiving orders for coals, the words “Coal office” being exhibited in front (*s*), but an auction of furniture belonging to the house is no breach (*t*).

(*m*) *Jones v. Thorne*, 1823, 1 B. & C. 715.

(*n*) *Our Boys’ Clothing Co. v. Holborn, &c. Co.*, 1896, 12 T. L. R. 344.

(*o*) *Wood v. Cooper*, 1894, 3 Ch. 671.

(*p*) *Seaward v. Paterson*, 1896, 12 T. L. R. 525. As to covenant against games of chance, see *Fairtlough v. Whitmore*, 1895, 11 T. L. R. 288.

(*pp*) See *Bray v. Fogarty*, 1870, 1. R. 4 Eq. 544.

(*q*) *German v. Chapman*, 1877, 7 C. D. 271.

(*r*) *Hobson v. Tulloch*, 1898, 1 Ch. 424.

(*s*) *Wilkinson v. Rogers*, 1863, 2 D. J. & S. 62. See 12 W. R. 119.

(*t*) *Reeves v. Cattell*, 1876, 24 W. R. 485. As to covenant not to “permit” sale by auction, see *Toleman v. Portbury*, 1870, L. R. 5 Q. B. 288; 7 Q. B. 344; and as to covenant against the erection of a dwelling-house, see *Domville v. Colville*, 1873, 1. R. 7 C. L. 68.

Private
residence,
&c. (*pp*).

COVENANT, in a lease of a public-house (*a*), *not to do, omit, or permit, or suffer to be done or omitted, any act, matter or thing whatsoever that can or may affect, lessen or make void any of the licences for the time being granted to the public-house.* The lessee is convicted of offences against the Licensing Acts, but under sect. 13 of the Licensing Act, 1874, the convictions are not recorded on the licences. The licences are not “affected,” and there is no breach (*y*). Otherwise if the words are “*whereby the licences necessary for using the premises as a public-house may be forfeited or the renewal thereof withheld,*” and convictions are indorsed (*z*). Where the lessee or his assign underlets, it is no breach on their part of such a covenant if the underlessee does something whereby the licence is forfeited (*a*) ; unless the forfeiture is really due to the default of the lessee, as where he lets the premises in a state unsuitable for carrying on the business of a public-house properly (*b*).

Forfeiture of licences.

COVENANT by the lessee *to use his best endeavours to keep the house open as a public-house.* If the licence is taken away, the lessee commits a breach of the covenant if he makes no attempt, by asking for a re-hearing or otherwise, to get the house open again (*c*).

Notwithstanding that agreements intended to compel the lessees of public-houses to purchase beer of the lessors have been held to be injurious to the public welfare (*d*), their validity is well established (*e*) ; but there is an implied obligation on the landlord to supply the tenant with such

Construction of covenants relating to trading with particular persons.

(*u*) On a letting by parol there is no implied agreement against forfeiture of licence : *Maw v. Hindmarsh*, 1873, 28 L. T. 644.

(*y*) *Wooler v. Knott*, 1876, 1 Ex. D. 265. See *Fleetwood v. Hull*, 1889, 23 Q. B. D. 35 ; *Moore v. Robinson*, 1878, 48 L. J. Q. B. 156.

(*z*) *Harmann v. Powell*, 1891, 60 L. J. Q. B. 628.

(*a*) *Bryant v. Hancock & Co.*, 1898, 1 Q. B. 716 ; aff. 15 T. L. R. 490.

(*b*) *Bodkin v. Barker*, 1897, Times, 14 Dec.

(*c*) *Linder v. Pryor*, 1838, 8 C. & P. 518. See *Hooper v. Brodrick*, 1840, 11 Sim. 47 ; and as to the construction of covenants relating to licences, see *Bryant v. Hancock & Co.*, *supra*.

(*d*) *Cooper v. Twibill*, 1812, 3 Camp. 286, note (*a*). See *Doe v. Reid*, 1830, 10 B. & C. 849 ; *Thornton v. Sherratt*, 1818, 8 Taunt. 529.

(*e*) As to purchase through an agent, see *Edwick v. Hawkes*, 1881, 18 C. D. 199.

kinds of beer as he requires, and if it is not fulfilled the tenant may go elsewhere (*f*). And it seems to be incumbent on the plaintiff, suing for breaches of a covenant of this nature, to show that the beer delivered by him was good marketable beer (*g*).

Where the covenant is accompanied by a proviso for re-entry on non-performance, and for reduction of rent so long as it is performed, the covenant is absolute, and the lessee has not the alternative of dealing with a rival brewer on paying the unreduced rent (*h*).

Right of
assigns of
lessor.

If the covenant is to take beer from the lessors or their successors in trade, and the successors remove the brewery plant a distance of two miles and there brew, the trade is determined, and they cannot take advantage of the covenant (*i*); but it is otherwise if the covenant is to take beer from the lessors or their assigns generally: in such a case, upon a sale of the reversion to a different firm of brewers, the purchasers will take the benefit of the covenant (*k*). Where the covenant binds the lessee to take beer only from the lessor or his successors in business, and the lessor sells the reversion and at the same time continues to carry on his business, it has been held that the benefit of the covenant does not go to the purchaser of the reversion (*l*). In comparing the three cases just referred to, it should be noticed that in *Doe v. Reid* the covenant was with the lessors, "their executors, administrators or assigns, or their successors in their late or present trade of brewers," and it was assumed that the word "assigns" was to be limited by the words which followed, so as to mean assigns who were successors in business. In *Clegg v. Hands* the term "lessors" was extended by the definition clause to mean "assigns," and there was no limitation to successors in business. In *Birmingham Breweries, Lim. v. Jameson* the covenant was with the lessor and his firm and their

(*f*) *Semble, Edwick v. Hawkes*, 1881, 18 C. D. 199. See *Stancliffe v. Clarke*, 1852, 7 Ex. 439.

(*g*) *Thornton v. Sherratt*, 1818, 8 Taunt. 529, 530; *Holcombe v. Hewson*, 1810, 2 Camp. 391. See *Weaver v. Sessions*, 1818, 6 Taunt. 154.

(*h*) *Hanbury v. Cundy*, 1887, 58 L. T. 155.

(*i*) *Doe v. Reid*, 1830, 10 B. & C. 849.

(*k*) *Clegg v. Hands*, 1890, 44 C. D. 503.

(*l*) By the Court of Appeal in *Birmingham Breweries, Lim. v. Jameson*, 1898, 67 L. J. Ch. 403.

successors in business, and there was a definition clause extending "lessor" to "assigns"; but it was held that the definition clause did not apply to the covenant, and hence the case was analogous to *Doe v. Reid*.

Where a lessor agrees to supply to the lessee the whole of the chlorine still-waste as it comes from his still, at a given rate, and not to use, or injure, or part with any of the still waste except to the lessee, the lessee is bound to take the whole of the waste which, during his tenancy, comes from the still (*m*).

Agreements
for taking
produce.

Where in a lease of lime works it was stipulated that the lessor should furnish, and the lessee should take, a certain quantity of coal from specified collieries, and the full quantity was not raised by the lessor from those collieries, it was held that the lessee could go elsewhere only for the deficiency, and not for the whole quantity of coal (*n*).

COVENANT *to work coal mine as long as it is fairly workable.*

Construction
of covenants
relating to
working of
mines, &c. (*p*).

The lessee is not bound to work the mine at a dead loss (*o*). "Fairly workable" means that which can be fairly and properly got according to mining usage without extraordinary difficulty or expense (*q*).

COVENANT, in lease of brickfield, *to get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom.* Does not bind the lessee to go on working at a loss, even though a means of sale (at an unremunerative rate) might have been found for bricks made out of the demised clay (*r*).

COVENANT *to raise not less than two acres of coal annually, or pay rent for that amount, whether the same should be got or not,* with a proviso for cesser of the term if all the coal is exhausted. This is an absolute covenant, and the lessee must pay the rent notwithstanding

(*m*) *Bealey v. Stuart*, 1862, 7 H. & N. 753.

(*n*) *Wight v. Dicksons*, 1813, 1 Dow, 141.

(*o*) *Jones v. Shears*, 1836, 7 C. & P. 346. See *Phillips v. Jones*, 1839, 9 Sim. 519.

(*p*) As to damage done in working mines, see *supra*, p. 140.

(*q*) See definition of "fairly wrought" by Pollock, C.B., in *Griffiths v. Rigby*, 1856, 1 H. & N. 237, at p. 241; though the definition was questioned in *Cartwright v. Forman*, 1866, 7 B. & S. p. 247.

(*r*) *Newton v. Nock*, 1880, 43 L. T. 197.

deficiency in the amount obtainable, or difficulty in working, until the coal is utterly exhausted (s).

COVENANT *to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries.* It is sufficient if it is found on competent trial to be impossible to get any coal fit to be worked (t).

COVENANT *to work mines in a proper and workmanlike manner* (u). Working by instroke from an adjoining mine is permissible, and the lessee is not bound to sink a separate pit for the demised coal (x).

COVENANT, in indenture demising all mines which had been or during the demise should be opened, *to work the mines in a proper and workmanlike manner.* The lessee is not liable under this covenant, if the mines have not been worked at all (y). But under a covenant to work a mine of rock salt in such a manner, it was held that the lessees must work, although by an accident prior to the lease the working was unduly difficult or expensive (z).

COVENANT *that the lessees shall work and carry on the mines with the utmost care and ability, and in the best and most effectual manner, according to the common mode and usual practice of carrying on collieries with effect.* The lessees are not bound to work all the demised seams at once, but may work a lower seam before a higher, if such is the common practice in the district (a).

COVENANT, in a lease where a minimum rent is reserved, *to work coal mines uninterruptedly, efficiently, regularly, and according to the usual or most improved practice.* There was no obligation on the lessees to sink pits, although that might be the most efficient mode of

(s) *Mellers v. D. of Devonshire*, 1852, 16 Beav. 252. Cf. *Lord Clifford v. Watts*, 1870, L. R. 5 C. P. 577; *supra*, p. 208.

(t) *Hanson v. Boothman*, 1810, 13 East, 22.

(u) For an instance of a special covenant relating to keeping the mine free from water and in repair and ventilated, see *James v. Cochrane*, 1853, 8 Ex. 556.

(x) *Jegon v. Vivian*, 1871, 6 Ch. 742; *Lewis v. Fothergill*, 1869, 5 Ch. 103. (y) *Quarrington v. Arthur*, 1842, 10 M. & W. 335.

(z) *Jervis v. Tomkinson*, 1856, 1 H. & N. 195.

(a) *Lord Abinger v. Ashton*, 1873, 17 Eq. 358.

working; and it was held that, so long as the minimum rent was paid, the lessees could not be compelled to work the mine at all (*b*). But this view seems to be erroneous, and the lessee may commit a breach of the covenant to work efficiently although he pays the minimum rent (*c*). A similar covenant in a lease of china clay is broken if for some months no fresh clay is got, but only the old stock worked (*d*).

COVENANT to work furnaces effectually, unless prevented by inevitable accident (e) or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture and process, make good common pig-iron. It is not necessary that the ingredients for the mixture should be procurable on the demised premises (f).

Where upon an agreement to grant a lease of coal for twenty-one years the only rent reserved was dependent on the quantity of coal raised, and was made payable quarterly; the lessee was bound to commence working immediately, and to proceed continuously (*g*).

Where certain acts are prohibited if done without the consent in writing of the lessor, and the lessor has for twenty years received the rent with full knowledge that a prohibited act—the converting of a dwelling-house into a public-house and grocery shop—has been done, the existence of a written licence may be presumed (*h*).

Presumption
of licence.

Where a lessor entitled in possession to receive the rents sues for breach of a covenant relating to the user of the demised premises, it is not necessary for him to show actual damage or pecuniary loss. But a remainderman must show actual damage to entitle him to relief by injunction (*i*).

Enforcing
covenant.

An injunction will be granted to restrain a breach of covenant, although the lessor is also secured by a power of

Injunction.

(*b*) *Wheatley v. Westminster Brynbo Coal Co.*, 1869, 9 Eq. 538.

(*c*) See per Jessel, M.R., in *Kinsman v. Jackson*, 1880, 42 L. T. 80; MacSwiney on Mines, 2nd ed. 243, note (1).

(*d*) *Kinsman v. Jackson*, *supra*.

(*e*) As to unavoidable accident, see *Morris v. Smith*, 1783, 3 Doug. 279.

(*f*) *Foley v. Adlenbrooke*, 1844, 13 M. & W. 174.

(*g*) *Sharp v. Wright*, 1859, 28 Beav. 150.

(*h*) *Gibson v. Doeg*, 1857, 2 H. & N. 615.

(*i*) *Johnstone v. Hall*, 1856, 2 K. & J. 414.

forfeiture and of exacting a penalty (*k*); but an injunction to restrain the working of collieries will be granted with great reluctance, and only where there is a breach of an express covenant or uncontroverted mischief (*l*). Specific performance of an agreement to work collieries in a particular manner will not be enforced (*m*).

A lessee who has not covenanted against underletting, and who cannot interfere with the underlessee, is not liable to an injunction if a breach of covenant is committed by the underlessee (*n*).

Acquiescence. Mere passive acquiescence does not bar the right to enforce a covenant; but otherwise where the covenantee has held out an inducement for infringement (*o*). But in the case of restrictive covenants affecting a building estate the right to enforce them may be lost by delay or acquiescence, or by a change in the character of the estate (*p*).

SECT. V.—CULTIVATION OF LAND.

	PAGE
(1) Where there is no express agreement	344
Obligation of tenant as to husbandlike cultivation	344
" " expenditure of produce on premises	345
Custom	346
(2) Where there is an express agreement	347
Construction of covenants relating to course of husbandry .	347
" " hay and straw, &c. .	348
" " manure	350
Provisions in case of execution, &c.	350

(1) WHERE THERE IS NO EXPRESS AGREEMENT.

Obligation of tenant as to husbandlike cultivation. Every tenant is bound to cultivate his farm in a husbandlike manner according to the custom of the country, and to consume the produce upon it. This is an engagement which arises out of the letting, and which the tenant

(*k*) *Barret v. Blagrace*, 1800, 5 Ves. 555. As to injunction against the lessor, see *Altman v. Royal Aquarium Society*, 1876, 3 C. D. 228.

(*l*) *Anon.*, 1754, Amb. 209.

(*m*) *Booth v. Pollard*, 1840, 4 Y. & C. Ex. 61. Cf. *Flint v. Brandon*, 1803, 8 Ves. 159.

(*n*) *Moses v. Taylor*, 1862, 11 W. R. 81. See *Tritton v. Bankart*, *supra*, p. 334.

(*o*) *L. C. & D. Ry. Co. v. Bull*, 1882, 47 L. T. 413. Cf. *Bray v. Fogarty*, 1870, 1 R. 4 Eq. 544; *De Bussche v. Alt*, 1878, 8 C. D. 286.

(*p*) See *Knight v. Simmonds*, 1896, 2 Ch. 294; *Meredith v. Wilson*, 1893, 69 L. T. 336; cf. *Craig v. Greer*, 1899, 1 I. R. 258.

cannot dispense with unless by special agreement (*q*). What is to be considered as a good and husbandlike mode of cultivation must vary exceedingly according to soil, climate and situation; therefore the "custom of the country," with reference to good husbandry, must be applied to the approved habits of husbandry in the neighbourhood under circumstances of a like nature. Evidence that an estate had been managed according to the custom of the country would be always a medium of proof that it had been treated in a good and husbandlike manner (*r*). In an action against a tenant for treating the demised farm contrary to good husbandry and the custom of the country, it is not incumbent on the landlord to prove a definite known custom or course of husbandry; it is sufficient to show what is *the prevalent course of good management*; and by proving that the estate was not so managed, the landlord will prove that it was treated contrary to good husbandry and the custom of the country (*s*). The fact that a tenant has half his farm under tillage at the same time, while no other farmer in the neighbourhood tills more than a third, is clear proof of mismanagement contrary to the custom of the country in good husbandry (*t*). Out of the bare relation of landlord and tenant, no obligation arises to make a certain quantity of fallow, and to spread a certain quantity of manure every year thereon (*u*).

The tenant must not carry dung and compost off the demised premises (*x*), or remove anything except according to the custom of the country (*y*). It has been laid down as a general rule that he is bound to consume the produce on the demised premises (*z*)—that is, such produce as would be consumed thereon if the farm were treated in a husbandlike manner; and it has been said that the tenant may carry

As to expenditure of produce on premises.

(*q*) Per Gibbs, C.J., in *Brown v. Crump*, 1815, 1 Marsh. 567; *Powley v. Walker*, 1793, 5 T. R. 373. Judgment in *Onslow v. —*, 1809, 16 Ves. 173; *Hallifax v. Chambers*, 1839, 4 M. & W. 662.

(*r*) Per Lord Ellenborough, C.J., in *Legh v. Hewitt*, 1803, 4 East, pp. 159, 160.

(*s*) Judgment of Lawrence, J., in *Legh v. Hewitt*, 4 East, p. 161.

(*t*) *Legh v. Hewitt*, 4 East, 154, 160.

(*u*) *Brown v. Crump*, 1815, 1 Marsh. 567. See judgment in *Granger v. Collins*, 1840, 6 M. & W. at p. 461.

(*x*) *Powley v. Walker*, 1793, 5 T. R. 373; *Gough v. Howard*, 1801, Peake, Add. Cas. 197.

(*y*) *Onslow v. —*, 1809, 16 Ves. 173.

(*z*) *Brown v. Crump*, 1815, 1 Marsh. at p. 569.

hay and straw off the premises, if the practice is not contrary to the custom of the country, or prohibited by the lease or agreement under which he holds (*a*). The custom of the country relating to cultivation will be excluded by an express or implied agreement inconsistent with it (*b*). An injunction will be granted to restrain any improper removal of produce (*c*).

A general restriction upon selling certain crops under an execution is imposed by the Sale of Farming Stock Act, 1816 :—

56 Geo. 3,
c. 50, s. 7.

Sheriff not to
sell clover, &c.
sown with
corn.

Custom.

No sheriff shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass whatsoever, which shall be newly sown, and be growing under any crop of standing corn.

The rule that the customs of the country are incorporated in a lease, save in so far as they are expressly or impliedly excluded, is well established (*d*). The relations between landlord and tenant have long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force (*e*). A custom which is at variance with the common law can only be established by proof of immemorial user (*f*) ; but this rule does not apply to a custom not touching the common law, and an agricultural custom is good provided it is reasonable (*g*), and has existed for a sufficient length of time—forty or fifty years—to be well established (*h*). Since a custom is local law, it cannot, it has been said, be got rid of except by statute, though long-continued non-user is strong evidence of the custom never having existed (*i*). But this rule only applies

(*a*) *Gough v. Howard*, 1801, Peake, Add. Cas. 197.

(*b*) *Hutton v. Warren*, 1836, 1 M. & W. 466. See *Webb v. Plummer*, 1819, 2 B. & A. 746 ; *Roberts v. Barker*, 1833, 1 Cr. & M. 808 ; *Clarke v. Roystone*, 1845, 13 M. & W. 752 ; *Greenslade v. Tapscott*, 1834, 1 C. M. & R. 55. *Infra*, p. 500.

(*c*) *Onslow v. —*, 1809, 16 Ves. 173. See *Walton v. Johnson*, 1848, 15 Sim. 352, where land had been let by a receiver appointed by the Court.

(*d*) See *Wigglesworth v. Dullison*, 1779, 1 Dougl. 201 ; 1 Sm. L. C. 10th ed. p. 528, and notes.

(*e*) See judgment in *Hutton v. Warren*, 1836, 1 M. & W. p. 475.

(*f*) Litt. s. 170 ; *Dusharood v. Magniac*, 1891, 3 Ch. 306, p. 370, per Kay, L.J.

(*g*) See *Tyson v. Smith*, 1838, 9 A. & E. 406.

(*h*) *Tucker v. Linger*, 1883, 8 A. C. 508.

(*i*) *Hamerton v. Honey*, 1876, 24 W. R. 603.

to custom established by immemorial usage. The usage of a particular estate, or of the property of a particular individual, however extensive, has not the force of a custom, for the tenant may not be aware of it (*k*). Where a custom is proved to exist, it is applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the terms of the agreement (*l*).

Where a farm was let with a reservation of mines and minerals and of quarries, a custom allowing the tenant to sell flints thrown up in the regular course of husbandry was held to be reasonable (*m*).

(2) WHERE THERE IS AN EXPRESS AGREEMENT.

COVENANT *not to sow land with wheat more than once in four years, nor with more than two crops of any kind of grain whatsoever during the same period of four years.* Applies to any four years of the term, however taken, and not to each successive four years from the commencement (*n*). Construction of agreements relating to course of husbandry.

COVENANT *to cultivate, on the four-course system, according to the custom of the country.* Means only so far as is universally obligatory by the custom of the country (*o*). A jury may find that the tenant ploughed as much as he was bound to do by the custom (*o*).

AGREEMENT *to manage and quit premises agreeably to the manner in which the same have been managed and quitted by the former tenants.* A tenant, without notice, is not bound by the terms upon which the former tenants held. The only rule by which, according to the agreement, he is to be guided, is the condition of the estate and the mode in which it was managed at the time of his taking possession (*p*).

(*k*) *Womersley v. Dally*, 1857, 26 L. J. Ex. 219.

(*l*) *Wilkins v. Wood*, 1848, 17 L. J. Q. B. 319.

(*m*) *Tucker v. Linger*, 1883, 8 A. C. 508.

(*n*) *Fleming v. Snook*, 1842, 5 Beav. 250.

(*o*) *Newson v. Smythies*, 1859, 1 F. & F. 477, 479. As to the meaning of a covenant to farm on the four-course system, see *Rankin v. Lay*, 1860, 2 D. F. & J. 65.

(*p*) *Liebenrood v. Vines*, 1815, 1 Mer. 15, 18. See *Hood v. Kendall*, 1855, 17 C. B. 260.

COVENANT to manage pasture in a husbandlike manner.
Is equivalent to a covenant not to convert it into arable land (q).

COVENANT to cultivate and manage a farm, and every part thereof, in a good, proper and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood. Is not broken by the conversion of the farm into market gardens, the farm being near London, and it being proved that other farms in the neighbourhood had been so converted, that being found to be the most profitable form of cultivation (r).

COVENANT, in a lease empowering the lessee to build, to cultivate the part of the demised lands on which no buildings should be erected, in a husbandlike manner. Applies to land on which buildings have been erected and subsequently pulled down (s).

COVENANT to permit the landlord in the last year of the term to sow clover among the tenant's barley. The landlord must use due diligence to ascertain for himself when the tenant sows his barley (t).

COVENANT at the end of the lease to leave the turnip or fallow breaks once ploughed for the incoming tenant. The words "turnip or fallow breaks" mean the land which would, in the natural course of good husbandry, be ploughed and left fallow for the purpose of being planted with turnips (u).

COVENANT not to remove from the farm, during the last year of the term, any of the hay, &c., which shall grow on the farm. The lessee is prohibited from removing hay, &c., which is on the farm in the last year of the term, at whatever time during the term it may have grown (x).

AGREEMENT that tenant shall not sell any straw or manure grown or produced on the farm without the licence of the landlord, under certain penalties, recoverable as

Construction
of agreements
relating to
hay and
straw.

(q) Per Lord Eldon, in *Drury v. Molins*, 1801, 6 Ves. 328.

(r) *Mene v. Cobley*, 1892, 2 Ch. 253.

(s) *Hills v. Rowland*, 1853, 4 D. M. & G. 430.

(t) *Hughes v. Richman*, 1774, Cowp. 125.

(u) *Hunter v. Miller*, 1863, 9 L. T. 159.

(x) *Gale v. Bates*, 1864, 3 H. & C. 84.

additional rent. Extends to straw sold by the tenant after the determination of the tenancy (y).

AGREEMENT *that tenant shall consume the hay on the premises, or for every load of hay removed shall bring two loads of manure.* The bringing on the manure is not a condition precedent to the carrying off the hay as between the landlord and tenant, but after the tenant has quitted possession of the premises the succeeding tenant may refuse to permit the hay to be removed until the manure is brought on (z).

AGREEMENT *that "value" of straw or hay sold off is to be returned in manure on the land.* The Court of Exchequer was equally divided upon the question whether the market value of the straw is to be returned in manure, or so much manure only is to be spent upon the land as the hay or straw would have produced (a).

AGREEMENT *that tenant shall be paid "a fair price" for straw left on the premises at the end of his tenancy, not containing any stipulation as to payment for manure.* The tenant is to be paid for the straw at a fodder price only—i.e. one-half the market price (b).

AGREEMENT *by tenant to pay an additional rent for every ton of hay, &c., sold off or removed from the premises.* Hay of very bad quality and unfit to be eaten by cattle is within the meaning of this agreement (c).

COVENANT *that lessee shall not sell or carry away from the demised premises any hay, straw or manure grown or produced thereon without the consent of the lessor, under the increased rent of 10l. for every ton so sold or carried away, but that the lessee will consume the hay and straw by his cattle.* The lessee is entitled to

(y) *Massey v. Goodall*, 1851, 17 Q. B. 310.

(z) *Smith v. Chance*, 1819, 2 B. & A. 753, 755. And as to covenants of this nature, see *Richards v. Bluck*, 1848, 6 C. B. 437; and as to the prolongation of the term for the purpose of the covenant, see *E. of St. Germain v. Willan*, 1823, 2 B. & C. 216.

(a) *Lowndes v. Fountain*, 1857, 11 Ex. 487. The opinion of Parke, B., was in favour of the latter construction.

(b) *Clarke v. Westrope*, 1856, 18 C. B. 765. As to the meaning of a "fair valuation," see *Cumberland v. Bowes*, 1854, 15 C. B. 348.

(c) *Fielden v. Tattersall*, 1863, 7 L. T. 718.

sell the hay and straw on payment of the increased rent (*d*).

Construction of agreements relating to manure.

CONDITION *not to sell or convey away any dung, &c., from a farm.* Extends to manure made on the farm by cows sold by the tenant and provided with provender by the buyer (*e*).

COVENANT *to manure land with two sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term.* The tenant may lay on both sets of muck within the three last years of the term (*f*).

Injunction.

A covenant to keep land in good husbandlike condition will not be enforced by mandatory injunction (*g*); nor will a covenant to repair hedges and fences and buildings (*h*), or that the tenant will at all times during the term keep on the farm a proper and sufficient stock of sheep, horses and cattle (*i*). Such an injunction would involve a superintendence of the management of agricultural land, such as the Court will not undertake (*i*). But an injunction will be granted against a specific act in violation of a covenant, as the breaking up of meadow land (*k*), or removing produce which should be consumed on the land (*l*).

Provisions in case of execution, &c.

Where a tenant is under obligation, either by custom or by express agreement, not to sell produce off the land, the Sale of Farming Stock Act, 1816, provides that a sale of produce under an execution against the tenant can only be made to a purchaser who undertakes to observe this obligation:—

56 Geo. 3,
c. 50, s. 1.

No sheriff shall, by virtue of any process of any court of law (except process at the suit of the Crown (*m*)), carry off, or sell or dispose of for the purpose of being carried off, from any lands let to farm, straw, chaff, colder, turnips, or manure in any case; nor hay, grass or grasses, nor tares or

(*d*) *Legh v. Lillie*, 1860, 6 H. & N. 165.

(*e*) *Hindle v. Pollitt*, 1840, 6 M. & W. 529.

(*f*) *Pownall v. Moores*, 1822, 5 B. & A. 416, 418.

(*g*) *Musgrave v. Horner*, 1875, 31 L. T. 632.

(*h*) *Rayner v. Stone*, 1762, 2 Eden, 128.

(*i*) *Phipps v. Jackson*, 1887, 56 L. J. Ch. 550.

(*k*) *Lord Grey de Wilton v. Saxon*, 1801, 6 Ves. 106.

(*l*) *Crosse v. Duckers*, 1873, 27 L. T. 816. See *Phipps v. Jackson*, *supra*, per Stirling, J.

(*m*) *Rex v. Osbourne*, 1818, 6 Price, 94.

vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, such hay, &c., ought not to be taken off such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff shall have received a written notice before he shall have proceeded to sale.

Sheriff not to sell off straw, &c., in any case, or hay, &c., contrary to covenants.

The tenant against whose goods any process shall issue, shall, on having knowledge of such process, give a written notice to the sheriff or other officer executing the same of such covenants or agreements, and of the name and residence of the landlord; and such sheriff or other officer shall forthwith send a notice by post to the landlord (as to whose name and residence he is to make due inquiry before any sale of any crops (sect. 5)), and also to the known steward or agent of such landlord, stating the fact of possession having been taken of any produce hereinbefore mentioned; and such sheriff or other officer shall, in the absence or silence of such landlord or his agent, delay the sale of such produce until the latest day he lawfully can appoint.

Sect. 2.

Tenant to give notice of covenants to sheriff.

Sheriff to give notice of seizure to landlord.

Such sheriff may dispose of any produce hereinbefore mentioned to any person who shall agree in writing, in cases where no covenant or written agreement shall be shown, to use and expend the same on such lands in such manner as shall accord with the custom of the country; and in cases where any covenant or written agreement shall be shown, according to such covenant or written agreement; and after such sale it shall be lawful for such person to use all such necessary barns, buildings, yards and fields for the purposes of consuming such produce, as such sheriff shall assign and such tenant would have been entitled to for the like purpose.

Sect. 3.

Sheriff may dispose of produce to person agreeing to expend it on land.

No assignee of any bankrupt, nor any assignee under any bill of sale, nor any purchaser of the goods or crop of any person employed in husbandry on any lands let to farm, shall take, use or dispose of any hay or other produce, or any manure or other dressings intended for such lands and being thereon, in any other manner than such bankrupt or other person so employed in husbandry ought to have taken, used or disposed of the same.

Sect. 11.

Assignee not to use produce in any other manner than tenant might have done.

This last section applies to an ordinary sale by the tenant himself (*n*), but not to a sale by the landlord under a distress (*o*); and it applies to a sale by a trustee in bankruptcy or liquidation under the modern bankruptcy Acts (*p*), notwithstanding disclaimer of the lease (*q*).

SECT. VI.—FENCES.

	PAGE
(1) Liability to repair	352
Obligation of tenant for years	352
" as between adjoining owners	352
(2) Liability to keep up boundaries	353
(3) Ownership of fences	354

(1) LIABILITY TO REPAIR.

Obligation of tenants for years.

It is so notoriously the duty of the actual occupier of lands to repair the fences, and so little the duty of the landlord, who is not in possession, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to the inheritance (*r*); and the tenant, on the other hand, may take sufficient wood for the purpose of repair (*s*). It would seem, however, that a tenant at will or from year to year, since he is not liable for mere permissive waste, is not bound to make good the decay of the fences (*t*).

Obligation of tenants from year to year or at will.

Where a lessee of a brickfield caused the fall of one of the fences bounding the field by excavating clay from under it, contrary to the covenants in his lease, the Court granted a mandatory injunction to compel its restoration (*u*).

Obligation as between adjoining owners.

The general rule of law is, that a man is only bound to take care that his cattle do not wander from his own land and trespass upon the lands of others. Hence, where two persons have adjoining fields, and there is no hedge between them, each must take care that his beasts do not trespass

(*n*) *Wilmot v. Rose*, 1854, 3 E. & B. 563.
(*o*) *Hawkins v. Walrond*, 1876, 1 C. P. D. 280.
(*p*) *Lybbe v. Hart*, 1883, 29 C. D. 8.
(*q*) *Lybbe v. Hart*, *supra*. See *Schofield v. Hincks*, 1888, 58 L. J. Q. B. 147.
(*r*) Judgment of Lord Kenyon, C.J., in *Cheetham v. Hampson*, 1791, 4 T. R. at p. 319. See *Whitfield v. Weedon*, 1771, 2 Chit. 685.
(*s*) Co. Litt. 53 b. (t) *Supra*, p. 328.
(*u*) *Newton v. Nock*, 1880, 43 L. T. 197.

upon his neighbour's land (*x*). But there is in general no liability to fence as between the owners of adjoining property. Such an obligation must be created in some definite way, as by prescription, or by contract, or by statute (*y*). The last case frequently occurs upon the inclosure of commons. It follows that there is no implied obligation on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut upon land demised to a tenant, so as to prevent the tenant's cattle from straying on to them (*z*). It follows, also, that a man is under no legal obligation to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words are introduced into the conveyance for that purpose (*a*).

(2) LIABILITY TO KEEP UP BOUNDARIES.

Among other obligations resulting from the relation of landlord and tenant, a tenant contracts an obligation to keep his landlord's property distinct from his own property during the term, and at the end of the term to leave it clearly distinct, and not in any way confounded with his own. If he has put his landlord's property and his own together, for his own convenience, in order to make the most of it during his tenancy, he is bound at the end of the term to render up specifically the landlord's land; and if the tenant has so confounded the boundaries that the landlord's land cannot be ascertained, a court of equity will inquire what was the value of the landlord's

Obligation of
tenant to
keep up
boundaries.

(*x*) 2 Rol. Abr. 565, pl. 7. See *Churchill v. Evans*, 1809, 1 Taunt. 529.

(*y*) *Erskine v. Adeane*, 1873, 8 Ch. 756. As to proof of obligation to repair, see *Boyle v. Tamlyn*, 1827, 6 B. & C. 329; *Barber v. Whiteley*, 1865, 34 L. J. Q. B. 212.

(*z*) *Erskine v. Adeane*, 1873, 8 Ch. 756.

(*a*) Per Bayley, J., in *Boyle v. Tamlyn*, 1827, 6 B. & C. at p. 337.

estate, valued fairly, but to the utmost, as against the tenant (*b*).

Where the tenant is the owner of land immediately adjoining the demised land, it is his duty, not merely to leave the boundary distinct at the end of the term, but to keep it distinct during the term; and the Court has jurisdiction during the term to ascertain the boundary if it has been confused (*c*).

(3) OWNERSHIP OF FENCES, &c.

There is no rule as to a certain width which the owner of a ditch is entitled to have. No man making a ditch can cut into his neighbour's soil; but usually he cuts it to the very extremity of his own land. He is, of course, bound to throw the soil which he digs out upon his own land, and often he plants a hedge on the top of it. If he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's soil, and is a trespasser (*d*). Hence, where two adjacent fields are separated by a hedge and a ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not (*e*). If there are two ditches, one on each side of the hedge, the ownership of the hedge must be proved by showing acts of ownership (*e*).

General presumption.

The common use of a wall separating adjoining lands belonging to different owners, is presumptive evidence that the wall belongs to the owners of those adjoining lands as tenants in common; for the law will presume that the acts of enjoyment were lawful (*f*).

(*b*) Judgment of Lord Eldon in *Att.-Gen. v. Fullerton*, 1813, 2 V. & B. at p. 264. See *Att.-Gen. v. Stephens*, 1855, 6 D. M. & G. 111, p. 133; *Aston v. Exeter*, 1801, 6 Ves. p. 293. As to ascertainment of boundaries where there is a rent-charge issuing out of lands, see *Searle v. Cooke*, 1889, 43 C. D. 519.

(*c*) *Spike v. Harding*, 1878, 7 C. D. 871.

(*d*) Per Lawrence, J., in *Vowles v. Miller*, 1810, 3 Taunt. at p. 138.

(*e*) Per Bayley, J., in *Guy v. West*, 1808, cited 2 Selw. N. P. 1244. See *Noye v. Reed*, 1827, 1 Man. & Ry. 63.

(*f*) *Cubitt v. Porter*, 1828, 8 B. & C. 257, 259, note (*b*), 266. See *Mutts v. Hawkins*, 1813, 5 Taunt. 20.

SECT. VII.—TREES.

	PAGE
(1) Where there is no express agreement	355
Property in trees as between landlord and tenant	355
" " " " and third persons	355
" bushes, &c.	355
Estovers	355
Windfalls	356
(2) Where there is an express agreement	356
Construction of agreements relating to trees	356

(1) WHERE THERE IS NO EXPRESS AGREEMENT.

The general property in timber-trees is in the landlord (*g*). Oak, ash and elm, which are timber-trees everywhere by the general rule of the realm, become timber at twenty years' growth (*h*). By the custom of the country, in some places, trees are considered as timber which, generally speaking, are not so (*i*). When a particular kind of wood is admitted to be timber by the custom of the country, the rule of law applicable to timber-trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth (*l*).

Property in trees as between landlord and tenant.

The landlord of a tenant from year to year, although there is no reservation of the timber on the premises, may bring an action of trespass against a third person for carrying it away after it has been cut down (*l*). Where a tree grows near the land of two persons, so that the roots derive nourishment from the soil of both, the property in the tree is to be ascertained by showing where it was first sown or planted (*m*).

Property in trees as between landlord and third person.

The property in bushes is in the tenant, but if he exceeds his right, as by grubbing up or destroying fences, he may be liable to an action of waste (*n*). Every tenant, except a tenant at will, may take sufficient wood to repair

Property in bushes.

Estovers.

(*g*) *Berriman v. Peacock*, 1832, 9 Bing. 384, 387.

(*h*) Judgment of Lord Ellenborough, C.J., in *Aubrey v. Fisher*, 1809, 10 East, at p. 455; Co. Litt. 53 a; *Dunn v. Bryan*, 1872, Ir. R. 7 Eq. 143. See *Whitty v. Dillon*, 1860, 2 F. & F. 67.

(*i*) See *Chandos v. Talbot*, 1731, 2 P. W. at p. 606; *Aubrey v. Fisher*, 1809, 10 East, 446; *Honywood v. Honnywood*, 1874, 18 Eq. 306, 309; *Dashwood v. Magniac*, 1891, 3 Ch. 306; Co. Litt. 53 a.

(*k*) *Aubrey v. Fisher*, *supra*.

(*l*) *Ward v. Andrews*, 1772, 2 Chit. 636.

(*m*) *Holder v. Coates*, 1827, M. & M. 112.

(*n*) *Berriman v. Peacock*, 1832, 9 Bing. 384, 387.

the walls, pales, fences, hedges and ditches as he found them; but he cannot make new fences, &c. He may also take wood to burn in the house, or for repairing the house, and for making and repairing implements of husbandry (*o*); but not for sale (*p*). If he cuts down growing wood to burn when he has a sufficient quantity of dead wood, he will be guilty of waste (*o*). In felling timber for repairs, he is bound to confine himself to such trees as are adapted for that purpose, and to employ them accordingly (*q*).

By custom the landlord may be entitled to ash-poles or shoots growing from old stools, and fit for cutting every seventeen or eighteen years (*r*).

Windfalls.

Windfalls of decayed timber-trees belong to the tenant for life or years, and windfalls of trees which are not timber may, in the absence of express exception, be claimed by him (*s*); and it is the same if such trees are cut down by the lessor (*t*). But windfalls of sound timber-trees, as between lessee and lessor, belong to the lessor (*s*).

(2) WHERE THERE IS AN EXPRESS AGREEMENT.

Construction
of agreements
relating to
trees.

COVENANT in a lease of a farm and quarries of stone thereon, with liberty to work the quarries, and containing an exception of trees, not to commit waste by cutting down timber-trees, saplings, or any other wood or underwood. Cutting down wood and underwood necessary to be cut down in order to work a quarry on the demised premises is not a breach of the covenant (*u*).

COVENANT that tenant shall not during the term cut down any of the coppice of less than ten years' growth or at any unseasonable time of the year. At the end of the term the landlord agrees to pay to the tenant the value of all such growth of coppice and underwood as shall be then standing and growing. The landlord is bound to pay the tenant for the value of all the

(*o*) Co. Litt. 53 b.

(*p*) Co. Litt. 53 b. See *Courtown v. Ward*, 1802, 1 Sch. & Lef. 8.

(*q*) *Simmons v. Norton*, 1831, 7 Bing. 640, 649.

(*r*) *Lord Hood v. Kendall*, 1855, 17 C. B. 260.

(*s*) *Craig on Trees*, 123. See *Herlakenden's Case*, 1589, 4 Rep. 62 a.

(*t*) *Channon v. Patch*, 1826, 5 B. & C. 897.

(*u*) *Doe v. Price*, 1849, 8 C. B. 894.

coppice of less than ten years' growth left standing on the demised premises at the end of the term, though no special consideration appears on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of the part of the coppice which the tenant was not entitled to cut (x).

COVENANT *to deliver timber growing on the premises sufficient for the repairs thereof.* The timber must be sufficient in quality as well as quantity (y).

COVENANT *to deliver up at the end of the term all the trees standing in the orchard at the time of the demise, "reasonable use and wear only excepted."* If the trees in the orchard are too crowded, the removal of such as are past bearing must be considered as a reasonable use of the orchard and trees (z).

COVENANT *not to fell, stub up, lop, or top timber-trees excepted out of the demise.* The executor of the lessor is entitled to sue for a breach of this covenant committed in the lifetime of the testator (a).

COVENANT *not to remove or grub up or destroy trees.* Removing trees from one part of the premises to another, or taking away trees, though the lessee plants a greater quantity than he takes away (those taken away not being dead), will constitute breaches of this covenant (b).

SECT. VIII.—INSURANCE.

	PAGE
Construction of general covenant to insure	357
„ „ covenant to insure in names of specified persons	358
Failure to insure	359
Statutory provision in case of fire	360

Under a *general covenant to insure and keep insured (bb)* the demised premises, the lessee must keep them insured

Construction of general covenant to insure and keep insured.

(x) *Love v. Pares*, 1810, 13 East, 80.

(y) *Snell v. Snell*, 1825, 4 B. & C. 741, 749.

(z) *Doe v. Crouch*, 1810, 2 Camp. 449, 450.

(a) *Raymond v. Fitch*, 1835, 2 Cr. M. & R. 588. As to the construction of exceptions of timber, see *supra*, p. 137.

(b) *Doe v. Bird*, 1833, 6 C. & P. 195.

(bb) Where the lessor has contracted to purchase the lease, the lessee remains liable on this covenant till completion; *Newman v. Maxwell*, 1899, 80 L. T. 681 (and see this case as to the damages recoverable).

during the whole term (*c*) ; the covenant is broken if they are uninsured at any time (*d*), although no inconvenience or loss may be occasioned to the landlord (*e*). The insurance must be made within a reasonable time after the execution of the lease, and if any delay occurs, the *onus* of showing that such delay is reasonable will rest on the tenant (*f*). But if the premises remain uninsured for a short time, the lessor cannot recover for a forfeiture for breach of covenant if by his conduct he has led the lessee to believe that the premises were properly insured by himself (*ff*).

The insurance must extend to the whole of the premises specified in the covenant, since a breach will be committed if any portion remains uninsured (*g*). Though no fire occurred during the period for which premises remained uninsured, a jury may give more than nominal damages to the landlord in respect of the possibility of loss to which he has been exposed (*h*).

Construction
of covenants
to insure in
names of
specified
persons.

A covenant to insure, which does not specify in what sort of office such insurance is to be effected, is not void for uncertainty (*i*) ; but express provision is frequently made, both as to the office in which the insurance is to be effected and the persons in whose names it is to be taken out. These particulars must be carefully observed by the tenant. A covenant to insure and keep insured *in the joint names of the lessee and lessor* will be broken by an insurance in the name of the lessee only (*k*) ; but if the conduct of the lessor has been such as to induce the lessee as a reasonable and cautious man to believe that he would do all that was required of him by insuring in his own name, the lessor cannot recover for a forfeiture (*l*).

(*c*) See *Heckman v. Isaac*, 1862, 6 L. T. 383.

(*d*) See judgment in *Doe v. Peck*, 1830, 1 B. & Ad. at p. 438.

(*e*) *Doe v. Shewin*, 1811, 3 Camp. 134, 137. See *Wilson v. Wilson*, 1854, 14 C. B. 616 ; *Price v. Worwood*, 1859, 4 H. & N. 512 ; *Doe v. Laming*, 1814, 4 Camp. 73.

(*f*) *Doe v. Ulph*, 1849, 13 Q. B. 204.

(*ff*) *Doe v. Sutton*, 1841, 9 C. & P. 706.

(*g*) *Penniall v. Harborne*, 1848, 11 Q. B. 368.

(*h*) *Hey v. Wyche*, 1842, 12 L. J. Q. B. 83, 85.

(*i*) *Doe v. Shewin*, 1811, 3 Camp. 134.

(*k*) *Doe v. Gladwin*, 1845, 6 Q. B. 953. See *Doe v. Rowe*, 1826, Ry. & M. 343.

(*l*) *Doe v. Rowe*, 1826, Ry. & M. 343, 346. As to relief against forfeiture for breach of a covenant to insure, see *infra*, p. 472.

Although this covenant is not literally performed by an insurance in the name of the lessor only, it is substantially performed for the benefit of the lessor, and he cannot recover for a breach of the covenant; the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter (*m*). A covenant to insure in the joint names of the lessor and his assigns and of the lessee cannot be broken after assignment by the lessor until notice to the lessee (*n*). A covenant to insure *in the names of three lessors* is broken by an insurance effected by the lessee in their names jointly with his own (*o*). Where the covenant is to insure in such office as the lessor shall name, it is doubtful whether it is broken by non-insurance if the lessor has not been asked and has not himself named any office (*p*).

So long as the terms of a covenant to insure are not complied with, there is a continuing breach, and the receipt of rent by the landlord will only operate as a waiver of breaches committed before the time when such rent was received (*q*). The assignee of the lessor cannot take advantage of a right of re-entry for a breach of a covenant to insure committed in the time of the lessor (*r*).

Failure to insure.

A policy of fire insurance is a contract of indemnity, and on payment of the loss the insurer is entitled to be put in the place of the assured, and to be subrogated to all his rights, whether these arise by contract, or by way of remedy for tort, or in any other manner (*s*); and if subsequently the assured receives compensation from other sources, the insurer is entitled to recover so much as is not required for the assured's indemnification (*t*).

Subrogation.

(*m*) *Havens v. Middleton*, 1853, 10 Hare, 641.

(*n*) *Crane v. Batten*, 1854, 23 L. T. O. S. 220.

(*o*) *Penniall v. Harborne*, 1848, 11 Q. B. 368.

(*p*) *Lillie v. Legh*, 1858, 3 De G. & J. 204.

(*q*) *Doe v. Gladwin*, 1845, 6 Q. B. 953. As to proof of non-insurance, see *Chaplin v. Reid*, 1858, 1 F. & F. 315; as to the requirement of indorsement on the death of the assured, see *Doe v. Laming*, 1814, 4 Camp. 73; as to forfeiture, see *infra*, p. 465.

(*r*) *Crane v. Batten*, 1854, 23 L. T. O. S. 220. For the result of failure to insure as between lessor, lessee, and underlessee, see *Logan v. Hull*, 1847, 4 C. B. 598.

(*s*) *Castellain v. Preston*, 1883, 11 Q. B. D. 380, per Brett, L.J., p. 388. See *West of England Fire Insurance Co. v. Isaacs*, 1896, 12 T. L. R. 466.

(*t*) *Darrell v. Tibbitts*, 1880, 5 Q. B. D. 560; *Castellain v. Preston*, *supra*.

nuisances or of the improvement of premises, which are intended to fall upon the owner, are made recoverable from the occupier, with the right for the occupier to deduct the amount from his rent. Expenses in respect of the removal of nuisances can thus be deducted under the Public Health Act, 1875 (*d*), s. 104, and the Public Health (London) Act, 1891 (*e*), s. 121. In the case of expenses for paving, &c., in respect of which a private improvement rate can be made under the former Act, an occupier at a rack-rent can deduct three-fourths of the amount paid by him on account of the rate, and an occupier at a rent less than the rack-rent can deduct from the rent such proportion of three-fourths of the rate as his rent bears to the rack-rent (*f*).

Poor rates are ordinarily assessed upon, and payable by, the occupier of premises (*g*); but in the case of short tenancies the tenant may be entitled to deduct the rate from his rent, and in the case of small tenements the landlord may be compelled, and has the option, to compound for the rates. The rating of owners instead of occupiers is now regulated by the Poor Rate Assessment and Collection Act, 1869 (*h*).

Under sect. 1, the occupier of any rateable hereditament let to him for a term not exceeding three months can deduct poor rate paid by him from his rent. Under sect. 3, where the rateable value of a hereditament does not exceed 20*l.* in the metropolis, 13*l.* in Liverpool, 10*l.* in Manchester or Birmingham, and 8*l.* elsewhere, the owner may agree to pay the poor rates, whether the hereditament

(*d*) 38 & 39 Vict. c. 55.

(*e*) 54 & 55 Vict. c. 76. See as to this statute, *Gebhardt v. Saunders*, 1892, 2 Q. B. 452.

(*f*) 38 & 39 Vict. c. 55, s. 214. As to deducting drainage tax imposed by a local Act, see *Dawson v. Linton*, 1822, 5 B. & A. 521.

(*g*) As to the exemption of the occupiers of agricultural land from half the amount of rates made for public local purposes, see the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16). As to the rating of plantations and mines, see the Rating Act, 1874 (37 & 38 Vict. c. 54); *D. of Devonshire v. Barrow Steel Co.*, 1877, 2 Q. B. D. 286; *Chaloner v. Bolckow*, 1878, 3 App. Cas. 933.

(*h*) 32 & 33 Vict. c. 41. As to the implied repeal of s. 19 of 59 Geo. 3, c. 12 (Poor Relief Act. 1819), see *West Ham v. Fourth City Building Society*, 1892, 1 Q. B. 654; and as to the construction of the Act, *West Ham v. Hes*, 1883, 8 A. C. 386. See also 30 & 31 Vict. c. 102, s. 7.

is occupied or not, upon a deduction not exceeding 25 per cent.; and compulsory rating of the owner in such cases is authorized by sect. 4 (*i*).

Occupation of
part of house.

The owner of a house, who occupies part of it, is liable to be rated for the whole, unless there is a separate occupation of the rest by some other person (*k*); and a person who lets lodgings, and retains the control for the purpose of attending to the rooms, is rateable (*l*). But where a house is let in separate tenements the tenants are liable to be rated separately, notwithstanding that certain parts of the premises are used in common (*m*).

General
district rate.

General district rates are, as a rule, levied on the occupiers of property; but the owner, instead of the occupier, may, at the option of the urban authority, be rated (1) where the rateable value of the premises does not exceed 10*l*; (2) where the premises are let to weekly or monthly tenants; and (3) where the premises are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly. Where the owner is rated, he is assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of such value; and where the reduced estimate is in respect of premises, whether they are occupied or unoccupied (*n*), the assessment may be made on one-half the amount at which the tenements would be liable to be rated if they were occupied and the rate were levied on the occupiers (*o*).

(2) WHERE THERE IS AN EXPRESS AGREEMENT.

Property tax.

In the case of the property tax it is not competent for the parties to enter into any agreement whereby the burden

(*i*) *Overseers of Norwood v. Salter*, 1892, 2 Q. B. 118; and as to the position of the occupier if the owner fails to pay, see sects. 8 and 12.

(*k*) *R. v. St. Mary, Durham*, 1791, 4 T. R. 477.

(*l*) *Watkins v. Overseers of Milton*, 1868, L. R. 3 Q. B. p. 357; *Allan v. Overseers of Liverpool*, 1874, L. R. 9 Q. B. p. 191. The landlord of a furnished house is liable for rates while the house is unlet; *Stanton v. Powell*, 1867, 1r. R. 1 C. L. 182.

(*m*) *Allchurch v. Hendon Union*, 1891, 2 Q. B. 436.

(*n*) A discretionary power to rate the owner in respect of premises, whether occupied or unoccupied, is thus given to the urban authority, provided the assessment is made on only one-half the rateable value: *Reg. v. Barclay*, 1882, 8 Q. B. D. 486.

(*o*) Public Health Act, 1875, s. 211.

would be shifted from the landlord to the tenant. This is the result of the Income Tax Act, 1842, s. 73, which provides as follows :—

No covenant or agreement between landlord and tenant, or any other persons, touching the payment of taxes and assessments, to be charged on their respective premises, shall be deemed to extend to the duties charged thereon under this Act, nor to be binding contrary to the intent and meaning of this Act; but all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such covenants or agreements.

5 & 6 Vict,
c. 35, s. 73.

Agreements
contrary to
meaning of
Act not to be
binding.

All contracts, covenants and agreements made or entered into or to be made or entered into for payment of any rent in full, without allowing such deduction (for the property tax), shall be utterly void (so far as regards such non-allowance of the deduction (*p*)). A provision for reducing the rent if the property tax shall be repealed is, however, valid (*q*).

Sect. 103.

Agreements
for payment
of rent with-
out deducting
property tax
to be void.

And similarly tithe rent-charge is payable by the owner of the land out of which it issues, notwithstanding any contract between him and the occupier of such lands, and any contract between an occupier and owner, made after the passing of the Tithe Act, 1891 (*r*), for the payment of the tithe rent-charge by the occupier, is void (*s*).

Tithe rent-
charge.

A local Act imposing a rate half on the landlord and half on the tenant, notwithstanding any agreement to the contrary, has been held to apply only to agreements entered into before the Act came into operation (*t*).

(*p*) *Gaskell v. King*, 1809, 11 East, 165; *Readshaw v. Balders*, 1811, 4 Taunt. 57; *Fuller v. Abbot*, 1811, *ib.* 105; *Tinckler v. Prentice*, 1812, *ib.* 549. See *Festing v. Taylor*, 1862, 3 B. & S. 217, 235. It was formerly held that where a landlord, who had agreed to allow property tax, distrained for the whole rent, the tenant could recover for the tax in an action for money had and received: *Graham v. Tate*, 1813, 1 M. & S. 609.

(*q*) *Colbron v. Travers*, 1862, 12 C. B. N. S. 181.

(*r*) *I.e.* 26th March, 1891.

(*s*) Sect. 1. As to whether covenants for payment of rates, taxes, &c., formerly included tithe rent-charge, see *Jeffery v. Neale*, 1871, L. R. 6 C. P. 240; *Lockwood v. Wilson*, 1874, 43 L. J. C. P. 179; *Parish v. Sleeman*, 1860, 1 D. F. & J. 326.

(*t*) *Re Knight*, 1848, 1 Ex. 802.

Right to agree
as to inci-
dence of rates
and taxes.

In general, however, the statutes which throw the burden of an imposition primarily upon the landlord expressly reserve the right of the parties to arrange otherwise. This is the case with regard to expenses incurred for the abatement of nuisances under the Public Health Act, 1875 (*u*), and the Public Health (London) Act, 1891 (*x*), and with regard to rates made under Part VI. of the former Act (*y*). Where a tenant from year to year agreed to pay all outgoings, and in the course of the tenancy a new rate was imposed which the tenants, in the absence of agreement to the contrary, could deduct from their rents, it was held that the agreement did not apply to such new rate, and that the tenant could deduct it, but only from the current year's rent (*z*).

*Construction of Agreements as to Payment of Rates
and Taxes.*

Agreement
for payment
of taxes.

AGREEMENT, *by tenant, to pay all taxes, &c.* The words comprehend the land tax, although not specially mentioned (*a*), and other parliamentary taxes (*b*). In a lease for years rendering rent free from all taxes, the lessor is discharged from all taxes whether old or new, which can be legally thrown on the lessee (*c*).

COVENANT, *by lessor, to pay all taxes on the land demised.* Does not include poor rates (*d*). The poor rate is not a tax on the land, but a personal charge in respect of the land (*e*); it is a burden falling on the occupier, whatever his interest, whether as tenant at will or by any other tenure (*f*), and the owner is not compellable to bear it (*g*). But where by an Inclosure Act a corn rent was reserved "free from all taxes and deductions whatsoever, except land

(*u*) See sect. 104.

(*x*) See sect. 121.

(*y*) See sect. 226.

(*z*) *Vestry of Mile End Old Town v. Whitby*, 1898, 78 L. T. 80.

(*a*) *Amfield v. White*, 1825, Ry. & M. 246. See *Hopwood v. Barefoot*, 1710, 11 Mod. 237.

(*b*) *Arran v. Crisp*, 1695, 12 Mod. 54.

(*c*) *Giles v. Hooper*, 1691, Carth. 135.

(*d*) *Theed v. Starkey*, 1725, 8 Mod. 314. But see *Burcroft v. Welland*, 1883, 12 L. R. Ir. 35.

(*e*) *Rowls v. Gells*, 1776, Cowp. p. 452, per Lord Mansfield, C.J.

(*f*) *Bute v. Grindall*, 1786, 1 T. R. p. 343.

(*g*) See *R. v. Hull Dock Co.*, 1824, 3 B. & C. p. 527.

tax," it was held to be exempt from poor rate (*h*).
 "If the money is raised by taxation," said Abbott, C.J., "it is a tax."

COVENANT to pay parliamentary taxes. Includes the land tax (*i*) and all taxes directly imposed by Parliament; but not a county rate (*k*), or sewers rate (*l*), or an assessment levied under an Act for repairing a bridge to the repair of which the owners of land are liable *ratione tenuræ* (*m*). A parliamentary tax is a tax imposed directly by Act of Parliament, and for the benefit of the whole kingdom; it does not include a rate for local purposes made under the authority of a local Act (*n*).

COVENANT to pay parochial taxes and assessments. Apparently includes a county rate (*o*).

COVENANT, by landlord, to pay land tax. The landlord is only liable to pay land tax in proportion to the rent reserved to him, and not according to the value upon which the premises are taxed (*p*).

AGREEMENT to demise a farm at the yearly rent of 40*l*. payable quarterly, free of all outgoings. The landlord is entitled to a net rent payable free of land tax (*q*).

COVENANT to pay a yearly rent of 60*l*. clear of all rates and assessments, sewers rate and land tax excepted. Where the tenant, by building on the land, has increased its rateable value, he is only entitled to deduct the proportion of the sewers rate and land tax payable upon the original rent (*r*).

COVENANT, by lessor, to pay all taxes now chargeable on the demised premises, and by lessee to pay all fresh taxes

(*h*) *Mitchell v. Fordham*, 1827, 6 B. & C. 274. See *Brewster v. Kidgell*, 1698, Carth. 438; 1 Ld. Raym. 317; 2 Salk. 616.

(*i*) *Manning v. Lunn*, 1845, 2 C. & K. 13. See *Christ's Hospital v. Harrild*, 1841, 2 M. & Gr. 707.

(*k*) See *Palmer v. Earith*, 1845, 14 M. & W. at p. 430.

(*l*) *Palmer v. Earith*, 1845, 14 M. & W. 428.

(*m*) *Baker v. Greenhill*, 1842, 3 Q. B. 148.

(*n*) *Bedford Union v. Bedford Improvement Commissioners*, 1852, 7 Ex. 777, per Alderson, B., p. 779.

(*o*) *Reg. v. Aylesbury*, 1846, 9 Q. B. 261.
 (*p*) *Yaw v. Leman*, 1743, 1 Wils. 21; *Whitfield v. Brandwood*, 1818, 2 Stark. 440. See *Ward v. Const*, 1830, 10 B. & C. 635.

(*q*) *Parish v. Sleeman*, 1860, 1 De G. F. & J. 326.

(*r*) *Smith v. Humble*, 1854, 15 C. B. 321; *Hyde v. Hill*, 1789, 3 T. R. 377.

which shall hereafter be charged on the premises. The lessor must pay the taxes chargeable on the premises at the time of making the lease, but the lessee must pay all fresh taxes, and also all such additions to the amount of the taxes formerly chargeable as are occasioned by the improved value of the premises (s).

Agreements
for payment
of rates and
taxes.

General rule
of construc-
tion.

Primâ facie a covenant which throws rates (t), taxes, and assessments upon the tenant ought to be construed as imposing upon him the duty to pay all assessments (u) of a temporary or recurring nature, and as leaving the landlord liable for assessments made for the permanent improvement of the premises (x). Hence:—

AGREEMENT, *by tenant, to pay all rates, taxes, and assessments payable in respect of the premises during the term* does not include a sum assessed upon the owner for paving expenses under the Metropolis Management Acts, 1855 and 1862, this being a charge imposed on the owner for the permanent improvement of the property (y). Similarly as to paving expenses under sect. 150 of the Public Health Act, 1875 (z).

If by statute the landlord's duty in the first instance is not to pay money, but to pave the street, with a provision that, on default of the landlord, the local authority may pave and charge the landlord with the expenses thereof, or, by way of additional remedy, charge the occupier, who may deduct sums so paid from his rent; a tenant who has

(s) *Watson v. Atkins*, 1820, 3 B. & A. 647. See *Graham v. Wade*, 1812, 16 East, 29; *Watson v. Home*, 1827, 7 B. & C. 285.

(t) A water rate may be within the covenant: *Direct Spanish Telegraph Co. v. Shepherd*, 1884, 13 Q. B. D. 202. Cf. *Badcock v. Hunt*, 1888, 22 Q. B. D. 145. But a covenant by the lessor to pay the water rate will not extend to water supplied for trade purposes: *Floyd v. Lyons & Co.*, 1897, 1 Ch. 633.

(u) A covenant by the lessee to pay rates imposed on the premises is not confined to rates payable by the landlord, and the covenant is broken by non-payment of poor-rate: *Hurst v. Hurst*, 1849, 4 Ex. 571. As to the effect of a statute throwing upon the owner the rates of a house occupied by an ambassador, see *Parkinson v. Potter*, 1885, 16 Q. B. D. 152.

(x) See *Thompson v. Lapworth*, 1868, 1 L. R. 3 C. P. p. 157; *Wilkinson v. Collyer*, 1884, 13 Q. B. D. 1, 5; *Aldridge v. Ferne*, 1886, 17 Q. B. D. p. 214.

(y) *Wilkinson v. Collyer*, *supra*.

(z) *Baylis v. Jiggins*, 1898, 2 Q. B. 315.

entered into a covenant similar to that above mentioned, including also "impositions," will not be liable to repay to the landlord the amount of such expenses (*a*). The landlord is charged for his breach of duty, and there is no rate, assessment or imposition within the meaning of the covenant (*a*). And if the local authority recover from the tenant, he may deduct the amount from his rent (*b*). So, where there is a similar covenant and notice is served on the landlord by the sanitary authority under the Public Health Act, 1875, s. 94, to abate a nuisance arising from defective drains, and the landlord, to prevent proceedings, remedies the defect, he cannot recover against the lessee (*c*).

But the covenant will have a wider scope if it contains such words as "burdens," "outgoings," or "duties," and it will then throw upon the lessee the cost of executing permanent improvements.

"Burdens,"
"duties,"
"outgoings."

Covenant, by lessee, to bear, pay and discharge the land tax (if any), sewers rate, borough rate . . . and all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial, or otherwise, which then were or which thereafter during the term should be taxed, charged, rated, assessed or imposed on the premises, or upon the landlord or tenant in respect thereof or in respect of the yearly rent. The drainage having become defective, the local sanitary authority served a notice upon the lessors to abate the nuisance, and, the notice not having been complied with, obtained an order from the justices to the like effect. The lessors then did the necessary works. Held, that they were entitled to recover the costs from the lessee (*d*). And similarly, if the works are done by the local authority, the expense will ultimately fall on the tenant (*e*).

(*a*) *Tidswell v. Whitworth*, 1867, L. R. 2 C. P. 326 ; *Lyon v. Greenhow*, 1892, 8 T. L. R. 457.

(*b*) *Home and Colonial Stores v. Todd*, 1891, 63 L. T. 829 (expenses of drainage works under the Metropol. Management Acts, 1855 and 1862).

(*c*) *Rawlins v. Briggs*, 1878, 3 C. P. D. 368.

(*d*) *Budd v. Marshall*, 1880, 5 C. P. D. 481 ; *Re Robertson and Thorne*, 1883, 47 J. P. 566 ; *Brett v. Rogers*, 1897, 1 Q. B. 525 ; *Farlow v. Stevenson*, 1899, 15 T. L. R. 249 ; *Antil v. Godwin*, 1899, 15 T. L. R. 462.

(*e*) *Sweet v. Seager*, 1857, 2 C. B. N. S. 119 (drainage) ; *Thompson v. Lapworth*, 1868, L. R. 3 C. P. 149 (paving) ; *Clayton v. Smith*, 1895,

COVENANT, *by the lessee, to pay during the term all existing and future taxes, rates, assessments, land tax, tithe or tithe rent-charge, and outgoings of every description for the time being payable either by the landlord or tenant in respect of the premises.* Held, that the lessor could recover from the lessee a sum assessed upon the owner for the paving of a street under the Metropolis Management Acts, 1855 and 1862 (*f*). The word "outgoings," which is at least as strong as "duties," took the case out of the principle enunciated by Manisty, J., in *Wilkinson v. Collyer* (*g*).

"Charged upon the premises."

Where the covenant binds the lessee to pay rates and assessments charged upon the premises, he is not liable unless a charge is actually created, as where expenses for which the owner is liable are incurred by the local authority under the Public Health Act, 1875 (*h*). Expenses incurred under the Metropolis Management Acts or under the Public Health (London) Act, 1891, are not a charge upon the premises, and to bring these in the covenant must extend to assessments "charged upon the lessor" (*i*) in respect of the premises.

COVENANT, *by lessee, to pay the sewers and main drainage rates, board of health, metropolitan and other district rates and assessments which, whether parliamentary,*

11 T. L. R. 374 (drainage). See *Payne v. Burridge*, 1844, 12 M. & W. 727.

(*f*) *Aldridge v. Ferne*, 1886, 17 Q. B. D. 212; *Crosse v. Raw*, 1874, L. R. 9 Ex. 209 (drainage); *Gardner v. Furness Ry. Co.*, 1883, 47 J. P. 232; *Re Bettingham*, 1892, 9 T. L. R. 48. See *Waller v. Andrews*, 1838, 3 M. & W. 312. It is apparently the same with a sum spent in providing fire-escape appliances under sect. 7 of the Factories and Workshops Act, 1891: *Arding v. Economic Printing Co.*, 1898, 79 L. T. 420; though in that case a subsequent covenant, throwing on the lessee a fair share of the expenses which the lessor might be called upon to pay by virtue of any Act of Parliament, was held to qualify the general covenant. The result is the same although the tenancy is under a three years' agreement only: *Batchelor v. Bigger*, 1889, 60 L. T. 416. See *Tubbs v. Wynne*, 1897, 1 Q. B. 74; *Jackson v. Ross*, 1898, 2 I. R. 65 (between vendor and purchaser); and *Glasgow Corporation v. Glasgow Tramway Co.*, 1898, A. C. 631 ("free from all expenses").

(*g*) *Supra*, p. 366.

(*h*) Sect. 257: *Hartley v. Hudson*, 1879, 4 C. P. D. 367. But service of notice of apportionment creates a charge so as to make the tenant liable under the covenant, although the works are not executed till after the tenancy has determined: *Wix v. Rutson*, 1899, 1 Q. B. 474.

(*i*) *Smith v. Robinson*, 1893, 2 Q. B. 53.

parochial, or otherwise, should during the term be charged or imposed upon the premises or upon or payable by the occupier or tenant in respect thereof. Held, that paying expenses assessed upon the demised house under the Metropolis Local Management Act, 1862, s. 96, was a charge imposed on the owner, and not a rate payable by the lessee under the covenant (*j*).

If a lessee covenants to pay rates and taxes, it appears that no demand by the collector is necessary to constitute a breach of the covenant so as to entitle the lessor to avail himself of a proviso for re-entry (*k*); where a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and pay it (*l*). Where the landlord is suing the tenant for taxes due by statute from the landlord which the tenant has engaged to pay, he should claim specially under the agreement (*m*).

SECT. X.—QUIET ENJOYMENT.

	PAGE
(1) Where there is no express agreement	369
Implied contract for quiet enjoyment	369
" " excluded by express covenant	371
Breach of implied contract	371
(2) Where there is an express agreement	371
Construction of general covenant for quiet enjoyment	371
" usual restricted covenant for quiet enjoyment	372
Breach of express covenant	373
Right to sue where entry cannot be made	375
Construction of special covenants for quiet enjoyment	376
Damages for breach of covenant for quiet enjoyment	377

(1) WHERE THERE IS NO EXPRESS AGREEMENT.

Upon a parol demise of a tenement there is implied a contract for quiet enjoyment, though not for title (*n*); but a lease by deed in which the word "demise" is used raises

Implied contract for quiet enjoyment.

(*j*) *Allum v. Dickinson*, 1882, 9 Q. B. D. 632. See *Bird v. Elvres*, 1868, L. R. 3 Ex. 225; *Hill v. Edward*, 1885, C. & E. 481.

(*k*) *Davis v. Burrell*, 1851, 10 C. B. 821.

(*l*) Per Jervis, C.J., 10 C. B. p. 826.

(*m*) *Spencer v. Parry*, 1835, 3 A. & E. 331.

(*n*) *Bandy v. Cartwright*, 1853, 8 Ex. 913; *Hall v. City of London Brewery Co.*, 1862, 2 B. & S. 737; *Robinson v. Kilvert*, 1889, 41 C. D. 88; *Hoare v. Chambers*, 1895, 11 T. L. R. 185. See *Granger v. Collins*, 1840, 6 M. & W. 458; *Messent v. Reynolds*, 1846, 3 C. B. 194.

a covenant both for quiet enjoyment and for title (*o*), for the word "demise" imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term (*o*). To raise the implication, however, there must be an actual demise; a mere agreement for demise will not do (*p*), unless it is capable of specific performance, and, on the doctrine of *Walsh v. Lonsdale* (*q*), is equivalent to an actual demise.

Cessation of
implied
covenant.

But this implied covenant ceases with the estate of the lessor; hence if, under a lease made by a tenant for life (not containing any express covenant for quiet enjoyment), the lessee is evicted by the remainderman after the death of the lessor, the lessee cannot maintain an action upon an implied covenant for quiet enjoyment against the executor of the tenant for life (*r*); and the rule is the same where a lessee for years sublets for a longer period than the unexpired residue of his term (*s*).

Failure to get
possession.

A person who lets premises agrees to give possession, and not merely to give a chance of a lawsuit (*t*). If he does not give possession, the lessee may recover damages against him, and is not obliged to bring ejectment against an occupier who wrongfully refuses to quit (*u*). But it is otherwise where there is merely an agreement to let (*x*).

Distress by
superior
landlord.

One of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment is that the landlord, if himself a lessee, shall, by paying over to the superior landlord the rent received from the undertenant, protect such undertenant from the superior landlord's distress (*y*).

(*o*) Per Littledale, J., in *Burnett v. Lynch*, 1826, 5 B. & C. at p. 609; *Iggulden v. May*, 1864, 9 Ves. at p. 330; *Mostyn v. West Mostyn Coal Co.*, 1876, 1 C. P. D. 145.

(*p*) *Brashier v. Jackson*, 1840, 6 M. & W. 549.

(*q*) 1882, 21 C. D. 9.

(*r*) *Adams v. Gibney*, 1830, 6 Bing. 656; *Penfold v. Abbot*, 1862, 32 L. J. Q. B. 67; *Schwartz v. Locket*, 1889, 61 L. T. 719.

(*s*) *Baynes & Co. v. Lloyd*, 1895, 1 Q. B. 820; 2 Q. B. 610.

(*t*) Judgment in *Coe v. Clay*, 1829, 5 Bing. 440.

(*u*) *Coe v. Clay*, *supra*; *Jinks v. Edwards*, 1856, 11 Ex. 775.

(*x*) *Drury v. Macnamara*, 1855, 5 E. & B. 612; unless the agreement is equivalent to a lease: *Walsh v. Lonsdale*, 1882, 21 C. D. 9.

(*y*) *Hancock v. Caffyn*, 1832, 8 Bing. at p. 366. See *Upton v. Fergusson*, 1833, 3 Moo. & Sc. 88.

The covenant implied in the word "demise" will be qualified and restrained by an express covenant for quiet enjoyment (*z*). Hence the lessee, upon an eviction by a paramount title, cannot recover under the implied covenant if the lease contains an express covenant for quiet enjoyment against the lessor and those who claim under him (*a*). Where the implied covenant was not available, the want of it was under special circumstances supplied by the principle that the lessor may not derogate from his grant (*b*).

Implied covenant excluded by express covenant.

Save as against the lessor, the implied covenant protects the lessee only against lawful disturbance (*c*). For tortious acts the lessee has his proper remedy against the wrongdoers (*d*). As against the lessor himself, however, the lessee can sue on the implied covenant whether the lessor's entry be lawful or no (*e*). The implied covenant for quiet enjoyment does not prevent the ordinary user of adjoining premises of the lessor, unless it was known to the lessor at the time of letting that such user would be detrimental to the purpose for which the premises were let (*f*).

Breach of implied covenant.

(2) WHERE THERE IS AN EXPRESS AGREEMENT.

A *general covenant for quiet enjoyment* extends only to the acts of persons claiming under a lawful title (*g*); for the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose (*h*). The construction, however, is different where an individual is named; for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be

Construction of general covenant for quiet enjoyment.

(*z*) *Line v. Stephenson*, 1838, 4 Bing. N. C. 678; 5 Bing. N. C. 183; *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836.

(*a*) *Nokes's Case*, 1599, 4 Rep. 80 b; *Merrill v. Frame*, 1812, 4 Taunt. 329.

(*b*) *Grosvenor Hotel Co. v. Hamilton*, *supra*.

(*c*) *Wallis v. Hands*, 1893, 2 Ch. p. 83. Cf. *Granger v. Collins*, 1840, 6 M. & W. 458.

(*d*) *Hayes v. Bickerstaff*, 1669, Vaughan, 118.

(*e*) *Andrews' Case*, 1591, Cro. Eliz. 214.

(*f*) *Robinson v. Kilvert*, 1889, 41 C. D. 88.

(*g*) *Dudley v. Folliott*, 1790, 3 T. R. 584.

(*h*) *Tisdale v. Essex*, 1614, Hob. 34; *Hayes v. Bickerstaff*, 1669, Vaughan, 118; *Foster v. Pierson*, 1792, 4 T. R. 617. See *Chaplain v. Southgate*, 1717, 10 Mod. 384; *Wotton v. Hele*, 1669, 2 Wms. Saund. 178, note (3).

reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise (*i*). And the covenant extends to all acts of the lessor, even though it in terms refers only to his lawful acts, for as against the party himself the Court will not consider the word "lawful," or drive the lessee to his action of trespass (*k*). If the covenant has been entered into, no interruption by the lessor is permissible, although the act would otherwise be lawful (*l*).

Where an agreement for a lease contained an agreement for an absolute covenant for quiet enjoyment, it was held that the lessee was entitled to a lease according to the contract with an unqualified covenant, notwithstanding that the lessor had no title to a part of the premises (*m*). In conveyances on sale an unqualified covenant for quiet enjoyment will not be restricted because it is associated with covenants for title which are qualified (*n*), provided it is not by the context rendered subject to the qualifying words (*o*). But a covenant for quiet enjoyment in a lease, which in terms extends to acts of all the world, may be cut down by further specification of the acts against which protection is given (*p*).

Usual
restricted
covenant.

In practice the covenant is usually expressly restricted to the acts of the lessor or persons lawfully claiming under him, and it applies therefore only to acts of a person claiming under the lessor which such person is entitled to do (*q*).

Effect of
covenant.

The covenant does not enlarge what is previously granted, but gives an additional remedy if the lessee cannot get, or is deprived of, that which has been previously professed to be granted (*r*).

(*i*) *Foster v. Mapes*, 1591, Cro. Eliz. 212; judgment of Lord Ellenborough, C.J., in *Nash v. Palmer*, 1816, 5 M. & S. at p. 380; *Fowle v. Welsh*, 1822, 1 B. & C. 29.

(*k*) *Crosse v. Young*, 1684, 2 Show. 425, 427; *Corus v. Anon.*, 1597, Cro. Eliz. 544. See *Lloyd v. Tomkies*, 1787, 1 T. R. 671.

(*l*) *Andrews v. Paradise*, 1725, 8 Mod. 318.

(*m*) *Onions v. Cohen*, 1865, 2 Hem. & M. 354.

(*n*) *Howell v. Richards*, 1809, 11 East, 633.

(*o*) *Smith v. Compton*, 1832, 3 B. & Ad. 189. See *Barton v. Fitzgerald*, 1812, 15 East, 530; *Young v. Raincock*, 1849, 7 C. B. 310.

(*p*) *Nind v. Marshall*, 1819, 1 Br. & B. 319.

(*q*) *Sanderson v. Mayor of Berwick-on-Tweed*, 1884, 13 Q. B. D. 547.

(*r*) *Leech v. Schweder*, 1874, 9 Ch. p. 474.

It is in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted (*s*); and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him (*t*), the covenant is broken, although neither the title to the land nor the possession of the land may be otherwise affected (*u*). This enlarges the older rule (*v*), according to which the covenant was a covenant to secure title and possession (*x*). But an act—such as building on adjoining land, and so interfering with the lessee's light and air—which would be a breach of covenant, may be excused by circumstances existing at the date of the lease and known to both parties which show that the right in question was not intended to pass by the demise (*y*). Thus the lessee of a house and garden, forming part of a large area of building ground, is not entitled under this covenant to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden (*z*).

What constitutes a breach.

The interruption may be the result of acts done off the demised premises. Thus, under a general covenant for quiet enjoyment contained in the lease of a coal mine, the working of ironstone lying between the surface and the demised coal in such a manner as to interrupt the lessee in his occupation of the mine, will constitute a breach (*a*). But there must be a physical interference with the enjoyment of the premises. For an interference arising by noise or otherwise the remedy is in respect of the nuisance (*b*).

Acts off the premises.

(*s*) See *Allport v. Securities Co., Ltd.*, 1895, 72 L. T. 533. For a merely temporary interruption the proper remedy is in damages, and an injunction will not be granted: *Leader v. Moody*, 1875, 20 Eq. 145. As to pleading a breach by eviction, see *Brookes v. Humphreys*, 1838, 5 Bing. N. C. 55.

(*t*) That is, claiming under him the right to do the acts which caused the interruption; per Lord Esher, M.R., in *Harrison, Ainslie & Co. v. Muncaster*, 1891, 2 Q. B. p. 685.

(*u*) See *Sanderson v. Mayor of Berwick-on-Tweed*, 1884, 13 Q. B. D. p. 551; *M. S. & L. Ry. Co. v. Anderson*, 1898, 2 Ch. 394.

(*v*) See per Lindley, L.J., in *Robinson v. Kilvert*, 1889, 41 C. D. p. 96.

(*x*) *Dennett v. Atherton*, 1872, L. R. 7 Q. B. 316.

(*y*) *Robson v. Palace Chambers Co.*, 1897, 14 T. L. R. 56.

(*z*) *Potts v. Smith*, 1868, 6 Eq. 311.

(*a*) *Shaw v. Stenton*, 1858, 2 H. & N. 858.

(*b*) *Jenkins v. Jackson*, 1888, 40 C. D. 71.

Establish-
ment of right
of common.

A decree in equity which subjected land to a general right of common, but which was not followed by any entry or actual disturbance, was held not to be a breach of the covenant (*c*).

Damage must
be foreseen.

The covenant does not protect the lessee against damage which could not with reasonable care have been foreseen to be the consequence of the acts complained of. An interruption under such a covenant is not caused by the lessor or those claiming under him, unless it is either a direct act of interruption, or unless it is some act of which it either was foreseen, or ought by reasonable care to have been foreseen, that the consequence in the particular case would be the interruption (*d*). Hence a disturbance of the working of a mine resulting from an unforeseen inrush of water into an adjoining mine held under the same lessor was held to constitute no breach of covenant (*e*).

Breach must
be subsequent
to lease.

Moreover the act, whether of commission or omission, must be subsequent to the granting of the lease (*f*); but where the act is done by a stranger under the authority of the lessor, it is sufficient that it is done during the enjoyment of the lessee, and a breach of covenant is committed notwithstanding that the authority was given before the lease (*f*).

Breach must
be by positive
act.

And the interruption must be the act of some person to whom the covenant extends. It is not sufficient that it is the *result* of an act or default of such person. Hence under the usual covenant it is no breach if the headlessor recovers possession in consequence of non-payment of rent by the sublessor (*h*); or if the demised premises are distrained upon for arrears of land tax due from the lessor (*i*); or if the possession of the sublessee is interfered with by the headlessor for non-observance by the sublessee of a covenant in the headlease of which the sublessor omitted to inform him (*k*).

(*c*) *Howard v. Maitland*, 1883, 11 Q. B. D. 695.

(*d*) Per Bowen, L.J., in *Harrison, Ainslie & Co. v. Muncaster*, 1891, 2 Q. B. 680 at p. 689.

(*e*) *Harrison, Ainslie & Co. v. Muncaster*, *supra*.

(*f*) *Anderson v. Oppenheimer*, 1880, 5 Q. B. D. 602. See *Blatchford v. Plymouth*, 1837, 3 Bing. N. C. 691.

(*h*) *Kelly v. Rogers*, 1892, 1 Q. B. 910. See *contra*, *Stevenson v. Powell*, 1612, 1 Bulst. 182. (*i*) *Stanley v. Hayes*, 1842, 3 Q. B. 105.

(*k*) *Spencer v. Marriott*, 1823, 1 B. & C. 457; *infra*, p. 376; *Dennett v. Atherton*, 1872, L. R. 7 Q. B. 316.

When contained in a lease of the exclusive right of shooting and sporting over a farm, this covenant does not hinder the tenant of the farm from using the land in the ordinary way, or from destroying furze and underwood in the reasonable use of the land as a farm; nor will the lessor be liable for wrongful acts committed by such tenant contrary to the reservation of his landlord (l).

Lease of sporting rights.

A covenant, by the lessor, for quiet enjoyment as against any person claiming by, from or under him, is broken by an eviction of the tenant by the lessor's widow entitled under a conveyance taken by the lessor to the use of himself and his wife (m); also by an eviction by a person claiming under a prior appointment by the covenantor and another person (n); by a remainderman under a settlement made by the lessor before the lease (o); or by a person claiming under a settlement made by the lessor under a power (p).

Breach by person claiming under lessor.

A covenant for quiet enjoyment contained in a lease of corporate property does not prevent the corporation from exercising their statutory rights, such as a right to establish a market (q).

Covenant by corporation.

It appears to be doubtful whether a lessee, who cannot enter because some one else is in possession under a lawful title, can sue his lessor on the covenant for quiet enjoyment (r). Such an action has been upheld (s), on the ground that the lessee ought not to be forced to enter and so subject himself to an action by a tortious act (t). On the other hand, it has been suggested that the action will not lie without actual entry and expulsion (u), and that the lessee has a sufficient remedy in his action against the

Right to sue where entry cannot be made.

(l) *Jeffries v. Evans*, 1865, 19 C. B. N. S. 246. See *Newton v. Wilmot*, 1841, 8 M. & W. 711; *infra*, p. 383.

(m) *Butler v. Swimerton*, 1623, Cro. Jac. 657.

(n) *Calvert v. Sebright*, 1852, 15 Beav. 156.

(o) *Hurd v. Fletcher*, 1778, 1 Doug. 43; *Evans v. Vaughan*, 1825, 4 B. & C. 261.

(p) *Carpenter v. Parker*, 1857, 3 C. B. N. S. 206.

(q) *Spurling v. Bantoft*, 1891, 2 Q. B. 384.

(r) At any rate the lessee must wait until he is entitled to possession: *Ireland v. Bircham*, 1835, 2 Bing. N. C. 90.

(s) *Cloake v. Hooper*, 1673, Freem. 122; *Ludwell v. Newman*, 1795, 6 T. R. 458.

(t) *Cloake v. Hooper*, *supra*.

(u) *Holder v. Taylor*, 1614, Hob. 12. Where the lessee is kept out of possession by the lessor, see *Hawkes v. Orton*, 1836, 5 A. & E. 367.

grantor of the term for not putting him into possession (*x*). But where the lessee was already in possession under a lease well granted, and took a fresh lease in reversion which proved to be invalid, he recovered damages in an action on the covenant for quiet enjoyment contained in the second lease (*y*).

Construction
of special
covenants for
quiet enjoy-
ment.

COVENANT, *by lessor, in an underlease, that lessee shall hold the premises without any lawful eviction, &c., by the lessor, or any persons whomsoever claiming by, from, under or in trust for her, or by or through her acts, MEANS, right, &c.* An eviction of the underlessee by the original lessor for a forfeiture incurred by the use of the premises as a shop, contrary to a covenant in the original lease, of which the underlessee had not been informed, is not an eviction by *means* of the lessor within the meaning of the covenant (*z*).

COVENANT *that the tenant, paying the rent and performing the covenants, shall quietly enjoy.* The payment of rent is not a condition precedent to the performance of the covenant for quiet enjoyment (*a*). The lessor's covenant for quiet enjoyment and the lessee's covenants to pay rent and to repair are independent covenants, and, upon default by the lessee, the lessor is not justified in calling upon the lessee's tenants to pay rent to him, the lessor (*b*).

CLAUSE *in a deed whereby the lessor "for himself, his heirs and assigns, the premises unto (the lessee), his executors, administrators and assigns under the rents, covenants, &c., before expressed, against all persons whatsoever lawfully claiming the same, shall and will, during the term, warrant and defend."* The clause operates as an express covenant for quiet enjoyment during the whole term granted by the lease (*c*).

(*x*) *Coe v. Clay*, 1829, 5 Bing. 440. See *Wallis v. Hands*, 1893, 2 Ch. p. 85; *Smart v. Jones*, 1864, 15 C. B. N. S. p. 727.

(*y*) *Lock v. Furze*, 1866, L. R. 1 C. P. 441.

(*z*) *Spencer v. Marriott*, 1823, 1 B. & C. 457. See *Woodhouse v. Jenkins*, 1832, 9 Bing. 431.

(*a*) *Dawson v. Dyer*, 1833, 5 B. & Ad. 584. And see *Edge v. Boileau*, *infra*.

(*b*) *Edge v. Boileau*, 1885, 16 Q. B. D. 117.

(*c*) *Williams v. Burrell*, 1845, 1 C. B. 402.

Where the covenant provides that the lessee shall quietly hold and enjoy the premises *for and during the said term*, the last words must be taken to refer to the term which the lessor assumed to grant by the lease, and not to the term which he actually had power to grant (*d*).

Upon the breach of a covenant for quiet enjoyment contained in a lease which turns out to be void, and under which the lessee has entered, the lessee is entitled to recover the value of the term and the costs of defending an action of ejectment, and also the sum recovered as mesne profits by the plaintiff in such action (*e*). And in the case referred to above, where a lease in reversion was invalid, the difference in value between the invalid lease and a substituted lease which the lessee accepted from the person entitled to the premises was taken as the test of the amount of damages recoverable against the original lessor (*f*). If the lessee has to remove to other premises in consequence of interference by the lessor, the damages will not be confined to the value of the term, but will include all loss naturally resulting, such as the expense to the lessee of removing his business (*g*).

Damages for breach of covenant.

SECT. XI.—LIVE STOCK (*h*).

Upon a lease of a stock of live cattle, the lessee is entitled, in the absence of special stipulation, to the use and profits of them during the term; and the lessor has only a possibility of property in case the cattle all outlive the term (*i*). If any of the cattle die during the term, the property in them rests absolutely in the lessee, and the lessor cannot claim to have them replaced after the term; hence he has no reversion to grant over to another, either during the term or after, until the lessee has re-delivered the cattle to

Rights and liabilities of lessee and lessor.

(*d*) *Evans v. Vaughan*, 1825, 4 B. & C. 261, 268.

(*e*) *Williams v. Burrell*, 1845, 1 C. B. 402; *Rolph v. Crouch*, 1867, L. R. 3 Ex. 44. Where the interruption does not amount to the loss of the term, there is a continuing cause of action, and the damages are assessed down to the time of assessment: R. S. C. Ord. 36, r. 58. See *Hole v. Chard Union*, 1894, 1 Ch. 293; *Child v. Stenning*, 1879, 11 C. D. 82.

(*f*) *Lock v. Furze*, 1866, L. R. 1 C. P. 441. See *Jones v. Hawkins*, 1886, 3 T. L. R. 59; *Sutton v. Baillie*, 1891, 65 L. T. 528.

(*g*) *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836.

(*h*) See article in 23 Sol. Journ. 208. (*i*) Bac. Abr. (A.) 639.

him (*j*). All the young produced by the cattle during the term belong to the lessee, but he cannot kill or dispose during the term of the cattle originally leased without being subject to an action of trespass (*j*).

Sometimes, however, provision is made for keeping up the flock or herd at the expense either of the lessor (*k*) or of the lessee (*l*), and for the re-delivery of the whole upon the determination of the tenancy, or payment of compensation (*l*).

A covenant by the lessee of sheep or cattle, on behalf of himself and his assigns, at the end of the lease to deliver sheep or cattle of the same value as those let to him, or to pay a certain price, is a personal contract only, and will not bind a person to whom the lessee has assigned the sheep or cattle (*m*).

In a lease of cows by the tenant of a farm to a dairyman, the terms may be that the dairyman shall pay so much a year for each cow, and in return take the milk and the calves, look after the cattle, and have certain rights of using the farm for this purpose. The owner of the cattle undertakes to support and maintain them, and it is stipulated that they shall have at certain times the exclusive pasture of certain specified fields (*n*). Where the agreement gave the lessee the right of pasturing the cattle on lands described as "summerleazes" and "after grass," evidence was admitted of a custom of the country that the lessor might put cattle of his own on the land called "summerleazes" up to 12th May (*o*).

SECT. XII.—GAME.

	PAGE
Reservation of game to landlord	378
Ground Game Act, 1880	381
Construction of agreements relating to game	383

Reservation
of game to
landlord.

Primâ facie the right to game is in the lessee of land (*p*), but, subject to the provisions of the Ground Game Act,

(*j*) See note (*i*), p. 377.
(*k*) *Wood and Foster's Case*, 1587, 1 Leon. 42.
(*l*) *Holme v. Brunskill*, 1877, 3 Q. B. D. 495.
(*m*) *Spencer's Case*, 1683, 5 Rep. 16 b (3rd resolution).
(*n*) *R. v. Tolpuddle*, 1792, 4 T. R. 671 ; *Burt v. Moore*, 1793, 5 T. R. 329.
(*o*) *Tudgay v. Sampson*, 1874, 30 L. T. 262.
(*p*) *Pochin v. Smith*, 1888, 52 J. P. 4.

1880 (*q*), the lessor can expressly reserve the right to himself, and his power to do so is recognized by the Game Act, 1831:—

Nothing in this Act contained shall authorize any person holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where, by deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game shall be reserved by or given to any grantor, lessor or other person whatsoever.

1 & 2 Will. 4,
c. 32, s. 8.
Act not to
affect agree-
ments relating
to game.

The same Act provides that the landlord may authorize other persons to kill game, and it imposes penalties on the unlawful killing of game by the tenant:—

Where the landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person or persons, who shall have obtained an annual game certificate, to enter upon such land for the purpose of pursuing and killing game thereon.

Sect. 11.
Landlord to
whom game
is reserved
may authorize
other persons
to pursue and
kill it.

Where the right of killing the game upon any land shall be specially reserved by or granted to, or shall belong to, the landlord, or any person whatsoever other than the occupier of such land, then, if the occupier of such land shall pursue, kill or take any game upon such land, or shall give permission to any other person so to do, without the authority of the landlord or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding two pounds, and for every head of game so killed or taken such sum of money not exceeding one pound, as to the convicting justices shall seem meet, together with the costs of the conviction.

Sect. 12.
Where game
belongs to
landlord,
occupier to be
subject to
penalty for
pursuing or
killing it.

In the Act “game” is defined to mean “hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards” (*r*); and the effect of the above sections is limited accordingly. Sect. 30 goes further, and imposes a penalty on

(*q*) *Infra*, p. 381.

(*r*) See definition in sect. 2.

persons trespassing in the daytime upon any land in pursuit of game, or woodcocks, snipes, quails, landrails, or conies; and unless the tenant has the right to the game, a licence from him will not be a defence to a person charged with trespassing in pursuit of game or any of the enumerated animals. If he gives such licence, the lessor, or other person having the right to the game, is for the purpose of prosecution under the section to be deemed to be the legal occupier of the land.

Reservation
depends on
right of entry.

To constitute a reservation of game to the landlord, it is not sufficient that the tenant agrees that he will not destroy it, and will forbid other persons to sport or trespass upon the land, and will preserve the game. There must also be a reservation to the landlord of a right of entry (*s*). Consequently, without such reservation, the tenant cannot be convicted under sect. 12 of killing game (*s*), though he would be liable on his agreement.

Rights of
licensees.

Where, apart from the Ground Game Act, 1880, a reservation of the right of sporting leaves the tenant at liberty to kill rabbits, he can direct other persons to do so, and such persons are not liable under sect. 30 (*t*), though it is otherwise where he simply gives leave to other persons to kill rabbits (*u*).

If there is no reservation of game to the landlord, the tenant can give other persons leave to sport over the land (*x*); but the leave must be actually given before the sporting begins, and a person is not saved from the penalty under sect. 30 by his *bonâ fide* belief that he had the occupier's leave (*y*). A reservation of game to the landlord upon a verbal letting enables the landlord to give authority to a person to kill game so as to save such person from being a trespasser under sect. 30 (*z*).

(*s*) *Coleman v. Bathurst*, 1871, L. R. 6 Q. B. 366.

(*t*) *Spicer v. Barnard*, 1859, 28 L. J. M. C. 176; *Padwick v. King*, 1859, 29 L. J. M. C. 42.

(*u*) *Pryce v. Davies*, 1871, 35 J. P. 374.

(*x*) *Pochin v. Smith*, 1888, 52 J. P. 4.

(*y*) *Morden v. Porter*, 1860, 7 C. B. N. S. 641.

(*z*) *Jones v. Williams*, 1877, 46 L. J. M. C. 270.

THE GROUND GAME ACT, 1880.

The Ground Game Act, 1880 (*a*), defines “ground game” to mean hares and rabbits (*b*), and confers upon the tenant the indefeasible right to kill ground game (*c*) :—

Every occupier of land (*d*) shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon concurrently with any other person who may be entitled to kill and take ground game on the same land; but the right thus conferred on the occupier is subject to the limitations specified in the section.

The limitations are as follow :—The occupier may kill ground game only by himself or by persons duly authorized by him in writing: the occupier himself and only one other person authorized by him may kill ground game with fire-arms: the persons authorized must be members of the occupier’s family resident on the land, persons in his ordinary service on the land, and one other person *bonâ fide* employed by him for reward in the destruction of ground game. The person authorized must, on demand by any person having a concurrent right to kill ground game, produce the document by which he is authorized (*e*).

An occupier entitled otherwise than under the Act to kill ground game retains, as incident to his occupation, the right declared by sect. 1, notwithstanding that he gives the right to kill ground game to any other person (*f*). Agreements which purport to divest or to prejudice the

Sect. 1.

Occupier to have right to kill ground game concurrently with any other person entitled.

Limitation on right to kill ground game.

Right cannot be divested.

(*a*) 43 & 44 Vict. c. 47.

(*b*) Sect. 8.

(*c*) Sect. 5 saved rights under leases and agreements current at the passing of the Act, and provided that tenancies from year to year or at will should determine for the purposes of the Act at the date when they would have been determined by notice to quit given on the passing of the Act. See as to the effect of the section, *Allhusen v. Brooking*, 1884, 26 C. D. 559; *Hassard v. Clark*, 1884, 13 L. R. Ir. 391.

(*d*) A person is not to be deemed an occupier of land for the purposes of the Act by reason of his having a right of common over the land, or by reason of an occupation for the purpose of grazing or pasturing sheep, cattle, or horses for not more than nine months: clause (2) of proviso to sect. 1. Clause 3 restricts the time during which the rights conferred by the section can be exercised in respect of moorlands and uninclosed lands (not being arable lands) to the period from 11 December to 31 March; except as to detached portions of moorlands or uninclosed lands (adjoining arable lands) which are less than twenty-five acres in extent.

(*e*) Sect. 1 (1).

(*f*) Sect. 2: *Morgan v. Jackson*, 1895, 1 Q. B. 885.

occupier's right under the Act are void (*g*), but a clause in a lease which is thus rendered void does not invalidate the remainder of the lease (*h*).

Restrictions
on exercise of
right.

Sect. 6 of the Act contains a restriction on the use of firearms at night for the purpose of killing ground game, and on the employment of spring traps (except in rabbit-holes) and poison.

Act does not
restrict rights
of occupying
owner.

The Act applies to the occupier of land as distinguished from the owner, and its object is to protect the occupier against a landlord who might be inclined to overstock the land with hares and rabbits (*i*). Consequently an owner of land, who is also the occupier, is not debarred from disposing as he pleases of the right to kill ground game, nor is he subject to the restrictions of sect. 6 as to the mode of killing the game (*i*). A lessee who has the right to kill game apart from the Act is subject to these restrictions (*k*).

Construction
of demise or
reservation of
right of shoot-
ing, &c.

Under a *demise or reservation of the exclusive right of hunting, shooting, fishing and sporting* over a farm, the person entitled to shoot over the farm must not trample fields of standing crops at a time when it is not usual or reasonable to do so (*l*). The reservation includes whatever is ordinarily known as "hunting, shooting, fishing and sporting," and under it the tenant of the land is not entitled (apart from statute) to shoot rabbits (*n*). He may, however, use the land in the ordinary and reasonable way; but must not resort to expedients for driving the game away (*o*). The destruction of furze and underwood in such reasonable use of the land is no eviction from the right of shooting (*o*). It seems that a grant of leave to hunt over premises does not give the grantee the liberty of shooting over them (*p*).

(*g*) Sect. 3.

(*h*) *Beardmore v. Meakin*, 1885, L. J. N. C. p. 8.

(*i*) *Smith v. Hunt*, 1886, 54 L. T. 422. But see *Anderson v. Vicary*, 1899, 2 Q. B. 436, where the decision in *Smith v. Hunt* was held to apply only to sect. 6, and not to the act generally.

(*k*) *Saunders v. Pitfield*, 1888, 58 L. T. 108.

(*l*) *Hilton v. Green*, 1862, 2 F. & F. 821.

(*n*) *Jeffryes v. Evans*, 1865, 19 C. B. N. S. 246, 264.

(*o*) *Jeffryes v. Evans*, 19 C. B. N. S. p. 266.

(*p*) See judgment of Gibb, C.J., in *Moore v. Plymouth*, 1817, 7 Taunt. at p. 627.

EXCEPTION of liberty for each tenant on his farm to kill rabbits with ferrets only (in a demise of a house and land with sole licence of shooting and sporting over lands, plantations and coverts of the lessor). The exception extends not only to farms existing at the time of the demise, but also to plantations, &c., which are subsequently let as farms (q).

Construction of special agreements relating to game.

GRANT to a person, his heirs and assigns, of free liberty, with servants or otherwise, to come into and upon lands and there to hawk, hunt, fish and fowl. Is a grant of a licence of profit, and not of a mere personal licence of pleasure; therefore it authorizes the grantee, his heirs and assigns, to hawk, &c., by his servants in his absence (r).

GRANT to lessee of right of sporting over land demised and other lands, "in common with the lessor, his heirs and assigns, and any friend of his or them." The exercise of the privilege is not confined to a single friend at a time (s).

The lessor, or other person entitled to sporting rights, is not entitled to bring game on the land, or to cause it to increase to an unreasonable extent, and if he does so the tenant may maintain an action for the damage done to his crops (t). And where a lease is taken on the faith of a parol undertaking by the landlord to kill down the game, this will be enforced as a collateral agreement (u). But a covenant by the lessee of sporting rights to keep down rabbits cannot be enforced against the lessee if the lessor has not reserved the right of sporting on the land in the occupation of his tenants, so that the lessee cannot enter on such lands (x).

Excess of game.

(q) *Newton v. Wilmot*, 1841, 8 M. & W. 711.

(r) *Wickham v. Hawker*, 1840, 7 M. & W. 63. See *Ewart v. Graham*, 1859, 7 H. L. C. 331.

(s) *Gardiner v. Colyer*, 1864, 12 W. R. 979.

(t) *Farrer v. Nelson*, 1885, 15 Q. B. D. 258; *Hilton v. Green*, 1862, 2 F. & F. 821; *Birkbeck v. Paget*, 1862, 31 Beav. 403.

(u) *Morgan v. Griffith*, 1871, L. R. 6 Ex. 70; *Erskine v. Adeane*, 1873, 8 Ch. 756.

(x) *Cornewall v. Dawson*, 1871, 24 L. T. 664.

SECT. XIII.—UNDERLEASES.

	PAGE
(1) Right to underlet	384
Where there is no express agreement	384
Where there is an express agreement	384
(2) What constitutes an underlease	386
Underleases distinguished from assignments	386
(3) Rights and liabilities of underlessee	387
As against original lessor	387
underlessor	389
Liability of underlessees as between themselves	389

(1) RIGHT TO UNDERLET.

Where there
is no express
agreement.

Tenant for
years or from
year to year.

A lessee for years or from year to year, unless restrained by express agreement, may, without the consent of his lessor, grant underleases for any number of years less than the term for which he holds the premises. A demise by a tenant from year to year to another, also to hold from year to year, is, in legal operation, a demise from year to year during the continuance of the original demise to the intermediate landlord (*y*). Where a tenant for a term of years sublets part of the premises to a tenant from year to year, and at the end of the term agrees with the superior landlord to hold from month to month, this does not prevent the continuance of the yearly subtenancy (*z*).

Tenant at
will.

There cannot, strictly speaking, be a tenant to a tenant at will, since, if the latter leases, the will is determined (*a*). But though a tenant at will cannot, as against his landlord, constitute another person tenant at will, he can make a tenant at will as against himself (*b*). One tenant at sufferance cannot make another (*c*).

Tenant at
sufferance.

Where there
is an express
agreement.

Leases frequently contain an express stipulation against the lessee subleasing without first obtaining the consent in writing of the lessor (*d*). An agreement for a building

(*y*) Per Parke, B., in *Oxley v. James*, 1844, 3 M. & W. 209, 212; *Pike v. Eyre*, 1829, 9 B. & C. 909; *Mackay v. Mackreth*, 1785, 4 Doug. 213.

(*z*) *Peirse v. Sharr*, 1828, 2 Man. & Ry. 418.

(*a*) Judgment of Buller, J., in *Birch v. Wright*, 1786, 1 T. R. at p. 382. See *infra*, p. 432.

(*b*) Per Patteson, J., in *Doe v. Carter*, 1847, 9 Q. B. at p. 865.

(*c*) Judgment of Lord Ellenborough, C.J., in *Thunder v. Belcher*, 1803, 3 East, at p. 451. See *Shopland v. Ryoler*, 1603, Cro. Jac. 55.

(*d*) As to the rights of the lessee against a sub-lessee who has gone into possession, in the event of the landlord refusing his consent, see *Fawkner v. Booth*, 1893, 10 T. L. R. 83. If the sub-lessee himself procures the disapproval of the landlord, he cannot get relief against the forfeiture of his deposit: *Davis v. Nisbett*, 1861, 10 C. B. N. S. 752.

lease containing such a stipulation will be specifically enforced, although the lessee alleges that he did not intend to build himself (e).

The effect of a provision that the consent is not to be unreasonably withheld is considered under the head of "Assignment" (f).

Covenant *not to underlease* is broken by an underletting from year to year (g).

Covenant, *by lessee, not to grant any underlease for any term whatsoever, or let, assign, transfer, set over or otherwise part with the messuage and premises without the special licence of the lessor.* Extends only to such underletting as a licence might be expected to be applied for, and therefore letting lodgings is not a breach of the covenant (h), though it is otherwise if the lessee parts with the exclusive possession of any portion of the demised premises (i).

Covenant *not to assign, transfer, set over or otherwise do or put away the lease or premises.* Does not extend to an underlease for part of the term (j).

Proviso *not to assign or otherwise part with the premises or any part thereof for the whole or any part of the term.* The words include an underlease (k).

Proviso for re-entry *if the lessee does any act whereby the premises become vested for the whole or any part of the term in any person other than the lessee* (l). Includes a subletting from year to year.

Covenant *not to let, set or demise the premises for all or any part of the term.* An assignment will be a breach (m).

A mere advertising for a tenant works no forfeiture under

Construction of express covenants relating to underletting.

Breach of covenant.

(e) *Haberdashers' Co. v. Isaac*, 1857, 3 Jur. N. S. 611.

(f) *Infra*, p. 394. (g) *Timms v. Baker*, 1883, 49 L. T. 106.

(h) *Doe v. Laming*, 1814, 4 Camp. 77.

(i) See *Roe v. Sales*, 1813, 1 M. & S. 297; and observations of Parke, B., in *Greenlade v. Tupscott*, 1834, 1 Cr. M. & R. at p. 59. As to stalls in an opera-house, see *Croft v. Lumley*, 1857, 6 H. L. C. 672.

(j) *Crusoe v. Bugby*, 1771, 2 W. Bl. 766; *Church v. Brown*, 1808, 15 Ves. at p. 265.

(k) *Doe v. Worsley*, 1807, 1 Camp. 20.

(l) *Dymock v. Showell's Brewery Co.*, 1898, 79 L. T. 329.

(m) *Greenaway v. Adams*, 1806, 12 Ves. 395. Cf. *Re Doyle and O'Hara's Contract*, 1899, 1 I. R. 113.

a covenant against underletting (*n*). To constitute a breach there must be a substantial parting with a substantial part of the demised premises (*o*).

Specific performance of an agreement to grant a lease to the plaintiff will not be refused simply because he has contracted to underlet for a purpose forbidden by the agreement (*p*).

Covenant in
underlease.

Where a lease contains a covenant against assigning or underleasing without the consent of the lessor, and such consent having been obtained, the lessee agrees to grant an underlease which is to contain provisions in all respects like those in the original lease, the covenant against assignment in the underlease should stipulate for the assent of the underlessor, and not of the headlessor (*q*) ; unless there are indications in the agreement that the covenants of the headlease are to be inserted without modification (*r*).

Approval of
head-lessor.

Where an agreement for a lease provides for payment of rent till the lease is granted, and the agreement is made subject to approval by the superior landlord, this approval is a condition precedent to a claim for rent (*s*).

(2) WHAT CONSTITUTES AN UNDERLEASE.

Underleases
distinguished
from assign-
ments.

The term granted by an underlease must be shorter than that which the underlessor himself possesses, although, as already stated, a tenant from year to year can underlet from year to year, and he will still retain a reversion which entitles him to distrain (*u*).

A grant by a man by deed of the whole of his interest in premises, or of a greater interest in them than he actually possesses (*x*), will operate as an absolute conveyance or assignment, whatever may be the form of words used, and though the deed reserves rent, and contains a

(*n*) *Gourlay v. D. of Somerset*, 1812, 1 V. & B. 68.

(*o*) *Maskiter v. Smith*, 1887, 3 T. L. R. 673.

(*p*) *Williams v. Cheney*, 1796, 3 Ves. 59.

(*q*) *Williamson v. Williamson*, 1874, 9 Ch. 729.

(*r*) *Haywood v. Silber*, 1885, 30 C. D. 404.

(*s*) *Brook v. Fletcher*, 1877, 37 L. T. 100.

(*u*) *Curtis v. Wheeler*, 1830, Moo. & M. 493 ; *supra*, p. 228.

(*x*) *Hicks v. Downing*, 1697, 1 Ld. Raym. 99 ; *Wollaston v. Hakevell*, 1841, 3 M. & Gr. 297, p. 323. See *Baker v. Gostling*, 1834, 1 Bing. N. C. 19.

power of re-entry on non-payment of rent (*y*). Since no reversion remains in the grantor, he cannot distrain for the rent (*z*), the statutory remedies for a rent-seck not applying to such a case (*a*). Even if an underlease for longer than the residue of the original term leaves in the underlessor a reversion by estoppel, yet this will not pass on a subsequent assignment of the residue of the original term, so as to enable the assignee to sue on the covenants in the underlease (*b*). And the payment of an instalment of the consideration for the assignment, though called rent, does not operate as an attornment so as to give a power of distress (*c*). A rent reserved on such a grant, however, is not merely a gross sum, but a payment in the nature of rent, and is recoverable as such (*d*). Similarly, where the parties intend to create the relation of landlord and tenant, a parol demise for all the residue of the interest of the lessor, since it cannot operate as an assignment, may be construed as a lease, and the lessor may maintain an action of use and occupation, or of debt for the rent thereby reserved, though he cannot distrain for it (*e*).

(3) RIGHTS AND LIABILITIES OF UNDERLESSEE.

The underlessee is not personally liable for the rent reserved in the original lease (*f*), but any goods belonging to him which are upon the demised premises may be distrained for arrears of rent due by the original lessee (*g*).

As against
original lessor.
As to rent.

The underlessee is not directly liable for breaches

As to cove-
nants in
original lease.

(*y*) *Beardman v. Wilson*, 1868, L. R. 4 C. P. 57; *Palmer v. Edwards*, 1783, 1 Dougl. 187 (note); *Parmenter v. Webber*, 1818, 8 Taunt. 593; *Thorn v. Woolcombe*, 1832, 3 B. & Ad. 586; *Pluck v. Digges*, 1831, 5 Bligh, N. S. 31. See *Smith v. Mapleback*, 1786, 1 T. R. 441; *Bryant v. Hancock & Co.*, 1898, 1 Q. B. 716, on app. 15 T. L. R. 490.

(*z*) See *Pascoe v. Pascoe*, 1837, 3 Bing. N. C. 898.

(*a*) *Anon. v. Cooper*, 1768, 2 Wils. 375. Cf. *Langford v. Selmes*, 1857, 3 K. & J. 220. (*b*) *Norris v. Craig*, 1895, 43 W. R. 480.

(*c*) *Hazeldine v. Heaton*, 1883, C. & E. 40.

(*d*) *Baker v. Gostling*, 1834, 1 Bing. N. C. 19; *Williams v. Hayward*, 1859, 1 E. & E. 1040; *Newcomb v. Harvey*, 1691, Carth. 161.

(*e*) *Pollock v. Stacy*, 1847, 9 Q. B. 1033. See observations of Bovill, C.J., in *Beardman v. Wilson*, 1868, L. R. 4 C. P. at p. 58. See also *Poultney v. Holmes*, 1721, 1 Stra. 405; *Preece v. Corrie*, 1828, 5 Bing. 24; and cf. *Barrett v. Rolph*, 1845, 14 M. & W. 348.

(*f*) *Holford v. Hatch*, 1779, 1 Dougl. 183.

(*g*) See *supra*, pp. 217, 229.

of the covenants in the original lease (*h*), but he may be evicted by the original lessor for a forfeiture incurred by such breaches, and, in that case, it would seem that, in the absence of fraudulent misrepresentation or concealment, he will have no remedy against his immediate lessor (*i*).

Underlessee considered to have notice of covenants in original lease.

Moreover, it is the duty of a person contracting for an underlease from year to year (*k*), or for any longer term, to inform himself of the covenants contained in the original lease; and if he enters and takes possession of the property, he will be considered as having full notice of, and will, in equity, be bound by such covenants (*l*). Hence the original lessor may obtain an injunction to restrain the underlessee from committing breaches of restrictive covenants in the original lease (*m*). Where a person takes an underlease from the assignee of a lease, the underlessee, without notice, is bound by the covenants contained in the assignment (*n*).

Rights under agreement for underlease.

An agreement to grant an underlease with specified covenants is equivalent to a representation that the headlease allows of such a grant, and, unless the underlessee has had a chance of inspecting the headlease (*o*), an underlease subject to narrower covenants will not be enforced (*p*); but in an action for breach of the agreement it has been held to be enough if the lessee shows that he was ready to grant an underlease according to the agreement, although not warranted by the headlease (*q*). If the underlessee is

(*h*) See *Berney v. Moore*, 1791, 2 Ridg. P. C. p. 323.

(*i*) See *Spencer v. Marriott*, 1823, 1 B. & C. 457, 459. As to the possibility of a remedy under the covenant for quiet enjoyment, see *supra*, p. 374, and *Hayward v. Parke*, 1855, 16 C. B. 295, 325.

(*k*) *Wilson v. Hart*, 1866, 1 Ch. 463.

(*l*) *Cosser v. Collinge*, 1832, 3 My. & K. 283. See *Flight v. Barton*, 1832, *ib.* 282; *Clements v. Welles*, 1865, 1 Eq. 200; *Nash v. Cochrane*, 1839, 3 Jur. 973.

(*m*) See *Clements v. Welles*, *supra*; *Tritton v. Bunkart*, 1887, 56 L. T. 306.

(*n*) *Clements v. Welles*, *supra*.

(*o*) *Hyde v. Warden*, 1877, 3 Ex. D. 722. An express covenant by the underlessee to deliver up landlord's fixtures does not imply a covenant by the underlessor that he will be at liberty to remove trade fixtures: *Porter v. Drew*, 1880, 5 C. P. D. 143.

(*p*) *Van v. Corpe*, 1834, 3 My. & K. 269.

(*q*) *Hayward v. Parke*, 1855, 16 C. B. 295 (on the ground that the sublessee would have his remedy against the lessee on his covenant for quiet enjoyment).

expressly informed of the restrictions in the headlease, he takes the risk of any permission to neglect the restrictions given to him by his own lessor (*r*).

Covenants to repair in a lease and an underlease granted at different periods, though in terms the same, are in effect substantially different, because each must be construed with reference to the age and character of the premises at the date of the demise. The underlessee is only bound to put them in the same condition as he found them in at the time of the lease to him (*s*). Hence the covenant in the underlease is not a covenant of indemnity, and if the original lessor has sued the lessee on his covenant to repair, the latter, though he can recover from his underlessee damages for the breach of covenant by the underlessee (*t*), cannot recover the costs incurred in defending the action (*u*), or damages for the forfeiture incurred through breach of the lessee's covenant (*x*). But if the sublease is made "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein," this is a covenant of indemnity, and the lessee is entitled against the sublessee to the costs of an action which the lessee has reasonably defended (*y*).

Liability of underlessee to underlessor as to repairs.

An undertenant may deduct from his rent compulsory payments made by him of arrears of rent due from the original tenant to the original landlord (*z*).

As to rent.

Where underlessees hold separate portions of premises at distinct rents, the whole of the premises being held under

Liability of underlessees as between themselves.

(*r*) *Brooks v. Tolputt*, 1884, 1 T. L. R. 39.

(*s*) *Pontifex v. Foord*, 1884, 12 Q. B. D. 152; *Walker v. Hatton*, 1842, 10 M. & W. 249. As to the damages recoverable against a sublessee for breach during the term of a covenant to keep in repair, see *Conquest v. Ebbetts*, 1896, A. C. 490; *supra*, p. 322.

(*t*) So he can recover the expenses of repairs executed under threat of forfeiture: *Colley v. Streeton*, 1823, 2 B. & C. 273.

(*u*) *Penley v. Watts*, 1841, 7 M. & W. 601; *Walker v. Hatton*, 1842, 10 M. & W. 249; overruling *Neale v. Wyllie*, 1824, 3 B. & C. 533. Substantial damages are recoverable, although the lessee incurs a forfeiture of the term by non-payment of rent: *Davies v. Underwood*, 1857, 2 H. & N. 570; and as to the rights of the sublessor against the sublessee when a forfeiture of the headlease has been incurred, see *Clow v. Brogden*, 1840, 2 M. & Gr. 39.

(*x*) *Logan v. Hall*, 1847, 4 C. B. 598; *infra*, p. 463.

(*y*) *Hornby v. Cardwell*, 1881, 8 Q. B. D. 329. See *Hammond v. Bussey*, 1887, 20 Q. B. D. 79. As to the parties where there is a covenant of indemnity, see *Byrne v. Brown*, 1889, 22 Q. B. D. 657. (*z*) *Supra*, p. 205.

one original lease at an entire rent; and one of the underlessees under threat of a distress by the owner of the reversion on the original lease pays the whole rent, an action is not maintainable by him to recover from the other underlessee, as money paid to his use, the proportion of the rent due from him (*a*). And similarly, where one part of the demised land has been assigned, and the rest underleased, since the parties are not liable to a common demand, and there is no one entitled to sue the underlessee for his share, the assignee cannot enforce contribution from the underlessee (*b*).

Renewal of
underlease.

Where an underlessor covenants for renewal of the underlease at the same rent, provided he obtains a renewal of his own lease, the underlessee is entitled to renewal without contributing to the fine or increased rent required on renewal of the headlease (*c*).

(*a*) *Hunter v. Hunt*, 1845, 1 C. B. 300.

(*b*) *Johnson v. Wild*, 1890, 44 C. D. 146.

(*c*) *Evans v. Walshe*, 1805, 2 Sch. & Lef. 519; *Revell v. Hussey*, 1813, 2 Ball & B. 280; *Lawder v. Blachford*, 1815, Beat. 522. And as to the head-renewal not being in the name of the underlessor, see *Lumley v. Timms*, 1873, 28 L. T. 608.

CHAPTER V.

ASSIGNMENTS.

	PAGE
SECT. I. VOLUNTARY	391
(1) Right to assign	391
Where there is no express agreement	391
Where there is an express agreement	392
Construction of covenant not to assign	392
Consent to assignment	394
Damages for breach	396
Effect of licence to assign	397
(2) Contract for assignment	397
(3) Mode of making assignment	399
Statutory requisites	399
(4) Rights and liabilities of assignee	401
As against lessor	401
Covenants running with land	404
Effect of re-assignment	409
Continued liability of lessee	410
As against lessee	410
Covenants to indemnify lessee	411
(5) Grant by landlord of his reversion	412
SECT. II. INVOLUNTARY	417
(1) On death	417
Of lessor	417
Of lessee	418
Executor's assent to bequest of leaseholds	418
" liability under lease	420
(2) On bankruptcy of lessee	423
Vesting in trustee in bankruptcy	423
Disclaimer	424
(3) On conviction of lessee for felony	428

SECT. I.—VOLUNTARY ASSIGNMENTS.

(1) *Right to assign.*

The right to assign, unless expressly restrained, is incident to the estate of every tenant (*a*), except a tenant by sufferance. An assignment by a tenant at will

Where there
is no express
agreement.

(*a*) See *Church v. Brown*, 1808, 15 Ves. at p. 264 ; *Doe v. Carter*, 1798, 8 T. R. p. 60.

determines the tenancy if the lessor has notice, but not otherwise (b).

Where there is an express agreement.

The lessor, either by proviso or covenant, may restrain the lessee from assigning (c); and if the lessor grants the term subject to a condition that it shall cease if the lessee assigns, an assignment by the lessee will be void. But where the restraint is by covenant only, the lessee by assigning will commit a breach of covenant, but the assignment itself will not be void (d). A proviso against assignment without licence contained in a lease to the lessee, his executors, administrators and assigns, is not repugnant; for the assigns mentioned in the proviso must be understood to be such as the lessee may lawfully have, i.e. assigns by licence (e). The covenant is still binding although the lessor has entered into possession of part of the land (f).

Construction of covenant not to assign.

A covenant not to assign or otherwise part with the demised premises or any part thereof without the licence of the lessor does not extend to an involuntary assignment, upon the death (g) or bankruptcy (h) of the lessee; or under a *bonâ fide* execution against him (k); or to an assignment to a railway company under the Lands Clauses Act (l); but if the tenant gives a warrant of attorney for the express purpose of having the lease taken in execution (m), or executes a deed assigning his property for the benefit of his creditors (n), he will commit a breach of the covenant. And the covenant is

(b) *Pinhorn v. Souster*, 1853, 8 Ex. 763; *Carpenter v. Colins*, 1606, Yelv. 73. See *infra*, Chap. VI., sect. 1 (2).

(c) If the assignment is void in law as an act of bankruptcy, it will not be a cause of forfeiture under a clause of re-entry on assignment without licence: *Doe v. Powell*, 1826, 5 B. & C. 308.

(d) See remarks of Holroyd, J., in *Paul v. Nurse*, 1828, 8 B. & C. at p. 488.

(e) *Weatherall v. Geering*, 1806, 12 Ves. 504, 511.

(f) *Collins v. Sillye*, 1651, Sty. 265.

(g) See *Seers v. Hind*, 1791, 1 Ves. p. 295; *Roe v. Harrison*, 1788, 2 T. R. 425.

(h) *Doe v. Bevan*, 1815, 3 M. & S. 353, 358, 360. See *Weatherall v. Geering*, 1806, 12 Ves. 504; *Doe v. Smith*, 1814, 5 Taunt. 795. As to the effect of the covenant in a lease granted to a limited company which is wound up, see *Elphinstone v. Monkland Iron Co.*, 1886, 11 A. C. 332.

(k) *Doe v. Carter*, 1798, 8 T. R. 57.

(l) *Slipper v. Tottenham and Hampstead Junction Ry. Co.*, 1867, 4 Eq. 112.

(m) *Doe v. Carter*, 1799, 8 T. R. 300.

(n) *Holland v. Cole*, 1862, 1 H. & C. 67.

not broken by a bequest of the term by the lessee (*o*), though the contrary seems to have been at one time held (*p*). The covenant, though expressly extending to assigns of the lease, does not bind assigns in law who take involuntarily, as a trustee in bankruptcy (*q*), though an administrator has been held to be bound as an assign (*r*). It seems, however, that an executor or administrator may dispose of the lease (*s*), unless they are named in the covenant (*t*).

A covenant not to assign or otherwise part with (*x*) the premises or with the indenture of lease is not broken by a deposit of the lease as security for an advance (*y*); "otherwise part with" is no more than "assign," and the effect of the covenant is only to restrain the lessee from completely alienating the legal estate in the premises (*z*). Where the lease is vested in partners, an assignment by one partner to the other has been held to be a breach (*a*); but this has been questioned (*b*), and at any rate it is no breach if, upon a dissolution, one partner remains in sole possession (*b*). A declaration of trust in favour of a limited company may be a breach of covenant not to assign or part with possession (*d*); but the covenant is not broken by the

Breach.

(*o*) Per Bayley, J., in *Doe v. Bevan*, 1815, 3 M. & S. p. 361; *Crusoe v. Eughby*, 1771, 3 Wils. p. 237; *Fox v. Swan*, 1655, Sty. 482.

(*p*) *Knight v. Mory*, 1588, Cro. Eliz. 60; *Barry v. Stanton*, 1594, *Ib.* 330; *Parry and Herbert's Case*, 1567, 4 Leon. 5.

(*q*) *Doe v. Bevan*, 1815, 3 M. & S. 353. As to effect of power of re-entry in case of tenant losing possession by act of law, see *Dyke v. Taylor*, 1860, 3 D. F. & J. 467.

(*r*) *Sir William More's Case*, 1584, Cro. Eliz. 26.

(*s*) *Seers v. Hind*, 1791, 1 Ves. jun. p. 295.

(*t*) *Roe v. Harrison*, 1788, 2 T. R. 425.

(*x*) As to possession by a stranger being evidence of a breach of covenant against parting with possession, see *Doe v. Payne*, 1815, 1 Stark. 86; *Doe v. Rickarby*, 1803, 5 Esp. 4. The covenant is not broken by the mortgage of a greenhouse which the lessee is entitled to remove: *Moss v. James*, 1878, 37 L. T. 715.

(*y*) *Doe v. Laming*, 1824, Ry. & M. 36; *Doe v. Hogg*, 1824, 4 D. & R. 226. See *Doe v. Bevan*, 1815, 3 M. & S. 353.

(*z*) Per Abbott, C.J., in *Doe v. Hogg*, 4 D. & R. p. 229.

(*a*) *Varley v. Coppard*, 1872, L. R. 7 C. P. 505.

(*b*) *Corp. of Bristol v. Westcott*, 1879, 12 C. D. 461, p. 465.

(*d*) *Richards v. Crawshaw*, 1892, 8 T. L. R. 446. In *Gentle v. Faulkner*, 1899, 68 L. J. Q. B. 848, it was held that a declaration of trust was, under sect. 24 (4) of the Judicature Act, 1873, equivalent to an assignment, and was a breach of covenant against assignment, but the correctness of the decision is doubtful.

sale of the business carried on upon the premises to a limited company, who make use of them, if the possession is really retained by the lessee (*e*).

There is a distinction between a covenant not to incumber and a covenant to do nothing whereby the estate may be incumbered, and the former applies only to a direct charge; not to the charge created by a judgment followed by execution (*f*).

Form of
licence.

If so desired, the licence (*g*) should expressly forbid the lessee from parting with the possession until a complete transfer of the legal interest has been effected. The practice of letting a purchaser into possession before the legal estate is transferred is, however, so common that, if it is intended to forbid it, such intention must be clearly expressed (*h*).

Consent
not to be
arbitrarily
withheld.

Where the covenant against assignment without the consent of the lessor is qualified by the proviso that such consent is not to be withheld "arbitrarily," or "unreasonably or vexatiously," or from an assignment to a "respectable and responsible person," this does not imply a covenant by the lessor not to refuse his consent arbitrarily, &c.; but the effect of such a refusal is to leave the lessee at liberty to assign without the lessor's consent (*i*). And where it is clear that the lessee has such liberty, notwithstanding the

(*e*) *Peebles v. Crosthwaite*, 1897, 13 T. L. R. 198.

(*f*) *Croft v. Lumley*, 1857, 6 H. L. C. 672; p. 742, per Lord Wensleydale; p. 738, per Lord Cranworth.

(*g*) Where the licence is indorsed on the assignment, it may be in the following form:—

I do hereby consent to the within-written assignment.

— February, 18—.

E. F.

If the licence is not indorsed on the assignment, the following form may be used (no stamp is requisite):—

I do hereby consent to the assignment by C. D. of all his estate in the premises demised by an indenture of lease, dated the — day of —, 18—, unto P. Q. of —, his executors and administrators; provided that this consent shall not authorize any further assignment of the premises or any part thereof, or in any way affect any of the covenants, conditions, or provisions of the said lease except as hereby expressed.

— February, 18—.

E. F.

Witness, N. O.

As to the production of the licence, see *Walker v. Ballamie*, 1605, Cro. Jac. 102. If it is required to be in writing, a parol licence is insufficient: *Richardson v. Evans*, 1818, 3 Madd. 218.

(*h*) *West v. Dobb*, 1869, L. R. 4 Q. B. 634.

(*i*) *Treloar v. Bigge*, 1874, L. R. 9 Ex. 151; *Hyde v. Warden*, 1877, 3 Ex. D. 72; *Sear v. House Property, &c. Society*, 1880, 16 C. D. 387.

withholding of consent, he can obtain specific performance of a contract for assignment (*k*).

Where it is provided that the lessor's consent is not to be withheld arbitrarily or without good and sufficient reason, it is enough that in the opinion of the landlord the use of the demised premises proposed by the intended assignee will deteriorate other property of his (*l*). It seems that an "arbitrary" refusal is the same as an unfair and unreasonable refusal (*m*), and a refusal "upon advice," though the grounds of the refusal be not specified, is not arbitrary (*m*). Where a heavy rent is reserved by the lease, strong ground should be shown for refusing consent to an assignment or a subletting (*n*). Where the consent is not to be refused unreasonably or to an assignment to a "person of responsibility or respectability," a corporation which cannot fulfil the objects of the lease is not within these last words (*o*). The refusal is not unreasonable if the assignees are not taking the lease for the purpose for which it was granted (*o*).

Where the consent is not to be arbitrarily withheld, the lessee is bound to ask for the consent, and an omission to do so, through forgetfulness, is not a matter in respect of which the Court can grant relief against a consequent forfeiture (*p*); even though the withholding of the consent would have been improper (*q*).

A covenant by the lessor that he will not unreasonably or vexatiously withhold his licence to assign is broken by his refusing his licence to assign to an unobjectionable person, in order thereby to obtain a surrender of the lease for the purpose of rebuilding (*r*), or in order to obtain possession of the premises himself (*s*).

Upon an agreement to assign a lease containing a covenant not to assign without the licence of the lessor, it is the duty

Duty to
obtain
licence.

(*k*) *White v. Hay*, 1895, 72 L. T. 281 (a case of underletting).

(*l*) *Bridewell Hospital v. Fawcner*, 1892, 8 T. L. R. 637.

(*m*) *Treloar v. Bigge*, 1874, L. R. 9 Ex. 151.

(*n*) *Sheppard v. Hongkong and Shanghai Bkg. Corp.*, 1872, 20 W. R. 459.

(*o*) *Harrison, Ainslie & Co. v. Corp. of Barrow-in-Furness*, 1891, 63 L. T. 834.

(*p*) *Barrow v. Isaacs*, 1891, 1 Q. B. 417.

(*q*) *Eastern Telegraph Co., Lim. v. Dent*, 1898, 78 L. T. 713. Aff. 1899, 1 Q. B. 835.

(*r*) *Lehmann v. M'Arthur*, 1867, L. R. 3 Eq. 746.

(*s*) *Bates v. Donaldson* 1896, 2 Q. B. 241.

of the vendor, and not of the purchaser, to procure the lessor's licence (*t*); and damages may be recovered against the vendor if he does not use his best endeavours to do so (*tt*). But if the agreement is expressly made subject to the lessor's approval, it is enough if the lessee does all he can to get the approval, although the lessor's conduct may in fact be unreasonable and vexatious (*u*). An assignee or under-tenant who comes in, in spite of a covenant against alienation, is none the less subject to the stipulations in the lease (*v*).

The mere fact that the landlord does not object to the assignee's taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignee (*x*); and a lessor who, not being aware of the lessee's covenant against assigning without consent, sees an assignee spending money on the premises, is not bound to assent to the assignment (*y*). A lessor who is not at first aware of the alienation can forfeit, if such be his remedy, as soon as he hears of it (*v*).

Payment for
licence.

Formerly a lessor might, unless prohibited by the form of the lease, stipulate for payment of a sum of money as the condition of his consent to an assignment or underlease, and if the amount was not exorbitant, the assignee or sub-lessee could insist on specific performance, or, in the alternative, damages (*a*). But under sect. 3 of the Conveyancing Act, 1892 (*b*), no fine or sum of money can be demanded for the lessor's consent, though he may require payment of a reasonable sum in respect of any legal or other expense incurred. This does not preclude the demand for deposit of a sum of money by way of security in a case where only part of a building contract has been performed (*c*).

Damages for
breach.

Where an assignee assigns without licence, it has been

(*t*) *Lloyd v. Crispe*, 1813, 5 Taunt. 249; *Mason v. Corder*, 1816, 7 Taunt. 9. As to specific performance where consent not obtained, see *Leitch v. Simpson*, 1871, 1r. R. 5 Eq. 613.

(*tt*) *Day v. Singleton*, 1899, 2 Ch. 309.

(*u*) *Lehmann v. M'Arthur*, 1868, 3 Ch. 496. As to the effect of an application by the intending assignee for a new lease, see *Winter v. Dumergue*, 1866, 14 W. R. 699.

(*v*) *Silcock v. Farmer*, 1882, 46 L. T. 404.

(*x*) *Elphinstone v. Monkland Iron Co.*, 1886, 11 App. Cas. 332.

(*y*) *Willmott v. Barber*, 1880, 15 C. D. 96.

(*a*) *Hilton v. Tipper*, 1868, 18 L. T. 626.

(*b*) 55 & 56 Vict. c. 13.

(*c*) *Re Cosh's Contract*, 1897, 1 Ch. 9.

held that the measure of damages in an action for breach of a covenant not to assign is the sum which will, as far as money can, put the lessor in the same position as if he still had the assignee's liability for breaches of covenant both past and future, instead of the liability of another of inferior pecuniary ability (*d*). Where the lessee sub-let the premises for the purpose of a turpentine distillery, and they were in consequence burnt down, it was held that the loss was the natural result of the breach of the covenant against assignment, and was recoverable as damages (*e*).

Formerly it was held that a licence to assign did away altogether with the covenant against assignment, so that there was no restriction on subsequent alienation (*f*); but now the licence extends only to the actual assignment, underlease, or other matter thereby specifically authorized to be done (*g*).

Effect of
licence.

(2) *Contract for Assignment.*

Any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, must be evidenced by a memorandum in writing; otherwise no action can be brought upon it.

Agreement
on sale.
Statute of
Frauds (*h*),
s. 4.

This enactment applies to all agreements which have the effect of binding the lessee to assign the residue of his term. Thus an agreement by A., the tenant, to relinquish possession, and to let B. be tenant for the residue of the term, is an agreement for assignment, and must be in writing (*i*). And where anything is agreed for which substantially amounts to a sale or parting with an interest in land, the contract is within sect. 4 (*k*).

A parol agreement for an assignment, although completed by transfer, will not support an action for the consideration; though, if the assignee has, after taking possession, admitted

(*d*) *Williams v. Earle*, 1868, L. R. 3 Q. B. 739.

(*e*) *Lepla v. Rogers*, 1893, 1 Q. B. 31.

(*f*) *Dumpor's Case*, 1603, 4 Rep. 119 b; 1 Sm. L. C. 10th ed. 31.

(*g*) 22 & 23 Vict. c. 35, s. 1; *Eyton v. Jones*, 1870, 21 L. T. 789. As to licence to one of several co-lessees, see sect. 2.

(*h*) 29 Car. 2, c. 3. As to parol evidence to explain the subject-matter of the agreement, see *Horsey v. Graham*, 1869, L. R. 5 C. P. 9.

(*i*) *Buttermere v. Hayes*, 1839, 5 M. & W. 456.

(*k*) See *Kelly v. Webster*, 1852, 12 C. B. 283; *Smart v. Harding*, 1855, 15 C. B. 652.

the amount to be due, it may be recovered in an action on an account stated (*l*).

Rights of
purchaser as
to title.

Formerly, unless there was an express stipulation to the contrary, every contract for the sale of a lease contained an implied undertaking, available at law as well as in equity, to make out the lessor's title to demise as well as that of the vendor to the lease itself (*m*). But upon the sale of an agreement for a lease, there was no implied contract that the lessor had power to grant the lease (*n*). Now under a contract to assign a term of years, derived out of a freehold or leasehold estate, the intended assign is not entitled to call for the title to the freehold (*o*); and upon a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign cannot call for the title to the leasehold reversion (*p*).

Disclosure by
vendor.

Upon the sale of a lease, whether by public auction (*q*) or by private contract (*r*), the vendor must disclose all that is necessary to protect himself, and it is not the duty of the purchaser to demand inspection of the lease before entering into the contract. Hence, where upon a sale by auction the particulars and conditions contained no statement as to the covenants in the lease (which were in fact onerous), nor any notice that the lease might be inspected, it was held that the purchaser was not bound to complete (*q*). It is a fatal misdescription that property described as held under a lease is in fact held upon an underlease, notwithstanding that the lease to be sold shows by its terms that it is an underlease, and that under the agreement the purchaser is to be deemed to buy with full notice of it (*s*).

Failure to
make title.

If at the date for completion the vendor can neither assign himself, nor compel an assignment from any other person, the purchaser can refuse to proceed. He is not bound to

(*l*) *Cocking v. Ward*, 1845, 1 C. B. 858.

(*m*) *Souter v. Drake*, 1834, 5 B. & Ad. p. 1002; *Purvis v. Rayer*, 1821, 9 Price, 488.

(*n*) *Kintrea v. Perston*, 1856, 1 H. & N. 357.

(*o*) Vendor and Purchaser Act, 1874, s. 2.

(*p*) Conveyancing Act, 1881, s. 3 (1). And see Conveyancing Act, 1882, s. 4, excluding preliminary contracts for a lease under a power from the title to the lease.

(*q*) *Re White and Smith's Contr.*, 1896, 1 Ch. 637. See *Midgley v. Smith*, W. N. 1893, p. 120.

(*r*) *Reeve v. Berridge*, 1888, 20 Q. B. D. 523.

(*s*) *Broom v. Phillips*, 1896, 74 L. T. 459. See *Darlington v. Hamilton*, 1854, Kay, 550.

wait and see if a third person, who has the power, will consent to join in making a title (*t*).

(3) *Mode of making Assignment.*

The actual assignment was also required by the Statute of Frauds to be in writing, and it must now be made by deed:—

No leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, shall be assigned unless it be by deed or note in writing, signed by the party so assigning or (his) agent thereunto lawfully authorized by writing, or by act or operation of law.

An assignment (*u*) of a chattel interest, not being copyhold, in any tenements or hereditaments shall be void at law (*v*),

(*t*) *Forrer v. Nash*, 1865, 35 Beav. 167; *Warren v. Moore*, 1898, 42 Sol. Journ. 699.

(*u*) For the stamp duty on an assignment of a lease upon a sale, see *supra*, p. 171, note (*b*). As to stamping the agreement for assignment where the interest sold is equitable, see sect. 59 of the Stamp Act, 1891 (54 & 55 Vict. c. 39); as to sale of a lease and goodwill, see *West London Syndicate v. Comm. of Inland Revenue*, 1898, 2 Q. B. 507. The capitalized value of the rent is not to be treated as part of the consideration by virtue of sect. 57: *Swayne v. Comm. of Inland Revenue*, 1899, 1 Q. B. 335. The duty on an assignment by way of security is as follows:—

(1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money—

Not exceeding 10 <i>l</i> .	.	.	.	.	.	0	0	3
Exceeding 10 <i>l</i> . and not exceeding 25 <i>l</i> .	.	.	.	.	.	0	0	8
25 <i>l</i> .	"	"	50 <i>l</i> .	.	.	0	0	1
50 <i>l</i> .	"	"	100 <i>l</i> .	.	.	0	2	6
100 <i>l</i> .	"	"	150 <i>l</i> .	.	.	0	3	9
150 <i>l</i> .	"	"	200 <i>l</i> .	.	.	0	5	0
200 <i>l</i> .	"	"	250 <i>l</i> .	.	.	0	6	3
250 <i>l</i> .	"	"	300 <i>l</i> .	.	.	0	7	6
300 <i>l</i> .	"	"		.	.			

For every 100*l*., and also for any fractional part of 100*l*., of the amount secured 0 2 6

(2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped—

For every 100*l*., and also for any fractional part of 100*l*., of the amount secured 0 0 6

(3) Being an equitable mortgage—

For every 100*l*., and any fractional part of 100*l*., of the amount secured 0 1 0

(*v*) But apparently an assignment under hand only would operate as an agreement to assign; *cf.* cases cited *supra*, p. 119, note (*o*).

unless made by deed. This requirement extends to the assignment of a tenancy from year to year (*x*).

22 & 23
Vict. c. 35,
s. 21.

Assignor
may assign
directly to
himself and
another
person.

By the Law of Property Amendment Act, 1859—which anticipated for leaseholds the provision of sect. 50 of the Conveyancing Act, 1881, with respect to freeholds—any person has power to assign personal property, at the date of the Act by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

Registration
under the
Registry Acts.

If the land is situated in Middlesex, and is outside the City of London, the assignment must be registered under the Middlesex Registry Act, 1708 (*y*) ; except in the case of a lease at a rack-rent, or a lease not exceeding twenty-one years, where the actual possession and occupation goes along with the lease (*z*). If the land is situated in Yorkshire, the assignment must be registered under the Yorkshire Registries Acts, 1884 (*a*) and 1885 (*b*) ; but this requirement does not extend to any lease not exceeding twenty-one years, or any assignment thereof where accompanied by actual possession from the making of such lease or assignment (*c*), or to Crown lands (*d*).

The Middlesex Registry Act does not apply to an equitable mortgage created by deposit of deeds unaccompanied by any memorandum (*e*) ; but it is otherwise under the present Yorkshire Act, and, for the mortgagee to obtain priority, he must register an instrument of charge (*f*). A further charge in favour of a first mortgagee requires to be registered (*g*).

Under the Middlesex Registry Act, as formerly under the old Yorkshire Acts, registration is an absolute test of priority at law (*h*), but not in equity ; and in equity a person taking

(*x*) *Botting v. Martin*, 1808, 1 Camp. 317. A covenant to employ a particular person to draw assignments and underleases does not extend to the assignment of an underlease. *Collett v. Young*, 1885, 33 W. R. 543.

(*y*) 7 Anne, c. 20. See the Land Registry (Middlesex Deeds) Act, 1891, Sched. I., and Rules of 1892 ; *Reg. v. Registrar of Middlesex*, 1850, 15 Q. B. 976. (*z*) Sect. 18. See Dart, Vend. and Purch. 6th ed. 769.

(*a*) 47 & 48 Vict. c. 54.

(*b*) 48 & 49 Vict. c. 26.

(*c*) Sect. 28 of Act of 1884.

(*d*) Sect. 30.

(*e*) *Sumpter v. Cooper*, 1831, 2 B. & Ad. 223.

(*f*) *Battison v. Hobson*, 1896, 2 Ch. 403.

(*g*) *Credland v. Potter*, 1874, 10 Ch. 8.

(*h*) *Doe v. Allsop*, 1821, 5 B. & A. 142.

under a registered assurance does not obtain priority over an unregistered assurance of which he had notice (*i*). But under the present Yorkshire Acts registration is the sole test of priority, save in cases of actual fraud (*k*).

A memorandum of agreement for the sale of land is not an "assurance" capable of registration under the Yorkshire Acts (*l*).

If the lease is for a life or lives, or is determinable on a life or lives, or for a term of years, of which more than twenty-one years are unexpired, the assignee can register his title at the Land Registry Office as possessory, qualified, or absolute, under the Land Transfer Acts, 1875 and 1897 (*m*); and in a district where registration becomes compulsory the purchaser of a lease or underlease having at least forty years to run, or two lives yet to fall in, will not obtain the legal estate in the term unless he registers his title (*n*). If the leasehold land is already on the register, the assignment must be registered.

Registration
under the
Land Transfer
Acts.

(4) *Rights and Liabilities of Assignee.*

A person who has accepted a valid assignment (*o*) from the lessee, although he has not taken possession of the premises (*p*), becomes liable for rent subsequently accruing (*q*), and for breaches, committed subsequently to the assignment (*r*), of such of the lessee's covenants as run with the land. On the other hand, he is entitled to sue the lessor for breaches, committed subsequently to the assignment (*s*), of such of the lessor's covenants as run with the land. A

1. As against
the lessor.

(*i*) *Le Neve v. Le Neve*, 1748, 3 Atk. 646, 651.

(*k*) See *Battison v. Hobson*, 1896, 2 Ch. 403.

(*l*) *Rodger v. Harrison*, 1893, 1 Q. B. 161.

(*m*) See *supra*, p. 182. Act of 1875, ss. 11, 13.

(*n*) Land Transfer Rules, 1898, rr. 58, 59.

(*o*) Though no assignment is actually proved, possession and payment of rent under the lease show sufficient privity to make the occupier liable as assignee for a forfeiture: *Doe v. Durnford*, 1832, 2 Cr. & J. 667.

(*p*) *Williams v. Bosanquet*, 1819, 1 Br. & B. 238; *Burton v. Barclay*, 1831, 7 Bing. 745, 761; *Pilkington v. Shaller*, 1700, 2 Vern. 374.

(*q*) As to apportionment of rent, see *supra*, p. 213.

(*r*) *Grescott v. Green*, 1701, 1 Salk. 199; *St. Saviour's, Southwark v. Smith*, 1762, 3 Burr. 1271; 1 W. Bl. 351. See *Hawkins v. Sherman*, 1828, 3 C. & P. 459.

(*s*) *Leves v. Ridge*, 1601, Cro. Eliz. 863.

bequest of leasehold property "to the lessees or holders of the present leases" has been held to include the assignees of the original lessees (*t*).

Assignee of
part of
premises.

The assignee of part of the demised premises is liable to an action on every covenant running with the land and affecting such part (*u*). He is not chargeable as assignee of the land for the entire rent (*x*), but after an assignment by the lessee of his interest in part of the demised land, the lessor may distrain upon that part for the rent which has accrued due for the whole (*x*). It seems that an assignee of an undivided moiety of the land comprised in the lease is chargeable with half the rent (*y*), or may be sued alone in respect of the covenants in the lease until he shows who are liable jointly with him (*z*). And where a joint and several covenant is originally entered into by joint lessees, an assignee of any of the lessees is subject to the entire liability (*a*).

At law actual
assignment
necessary for
covenants to
run with land.

For a covenant to run with the land so as to bind the assignee of the lease at law, it is necessary that there shall have been an assignment of the whole term either actually (*b*) or by estoppel (*c*). Hence an equitable interest in the term does not impose liability (*d*), and consequently an equitable mortgagee by deposit of a lease, although he has entered into possession and has paid rent, is not liable to the lessor upon the covenants, there being no privity between them until a privity of estate has been created by a legal assignment (*e*); and the equitable mortgagee is not compellable in equity at the suit of the lessor to take a legal assignment (*e*). This result is not altered by the Judicature Acts, since the distinction between legal and equitable estates is

(*t*) *King v. Rymill*, 1898, 78 L. T. 696.

(*u*) Judgment of Tindal, C.J., in *Wollaston v. Hakewill*, 1841, 3 M. & Gr. p. 322; Com. Dig. tit. Covenant (C.) 3; *Congham v. King*, 1631, Cro. Car. 221; *Stevenson v. Lambard*, 1802, 2 East, p. 580.

(*x*) *Curtis v. Spitty*, 1835, 1 Bing. N. C. p. 760.

(*y*) *Gamon v. Vernon*, 1679, 2 Lev. 231.

(*z*) *Merceron v. Dowson*, 1826, 5 B. & C. 479.

(*a*) *Norval v. Pascoe*, 1865, 34 L. J. Ch. 82.

(*b*) See *West v. Dobb*, 1869, L. R. 4 Q. B. 634.

(*c*) *Williams v. Heales*, 1874, L. R. 9 C. P. 177.

(*d*) See *Mayor of Carlisle v. Blamire*, 1807, 8 East, 487.

(*e*) *Moore v. Greg*, 1848, 2 Ph. 717; *Moores v. Choat*, 1839, 8 Sim. 508; *Robinson v. Rosher*, 1841, 1 Y. & C. C. C. 7; overruling *Lucas v. Comerford*, 1790, 1 Ves. J. 235; 3 Bro. C. C. 166; 8 Sim. 499.

still in force (*f*). An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, does not entitle the lessor to sue him on the covenants in the lease (*g*). But a lessee who has executed a declaration of trust is entitled to be indemnified by the equitable assignee (*h*). An occupier who gains a title against the lessee under the Statute of Limitations does not take by assignment, and is not liable on the covenants (*i*).

Upon a legal assignment being effected, the assignee becomes liable, although he takes only as mortgagee (*k*) or trustee (*l*), and has not entered into possession (*m*); and in the latter case the beneficiary cannot be made liable (*n*). But equity will not interfere to compel a mortgagee by assignment to perform a positive covenant, as a covenant to repair (*o*).

A general assignment of personal estate in a creditors' deed will pass leaseholds to the assignee, without specific mention, so as to render him liable on the covenants (*p*), notwithstanding power is reserved to exclude leaseholds (*q*)—at any rate until, in pursuance of the power, they are actually excluded (*q*); unless the specific words used point to chattels only, in which case, according to the rule of *ejusdem generis*, general words will not pass leaseholds (*r*).

General
assignment.

The doctrine of covenants running with the land applies only to leases created by deed (*s*). A mere assignment of a parol tenancy does not pass to the assignee the right

Lease not
by deed.

(*f*) See *Joseph v. Lyons*, 1884, 15 Q. B. D. 280.

(*g*) *Cox v. Bishop*, 1857, 8 De G. M. & G. 815; overruling *Close v. Wilberforce*, 1838, 1 Beav. 112. The law as thus settled is not altered by the doctrine of *Walsh v. Lonsdale* (21 C. D. 9; *supra*, p. 82). See *Friary, Holroyd & Co. v. Singleton*, 1899, 1 Ch. 86; reversed on the facts, 1899, 2 Ch. 261.

(*h*) *Close v. Wilberforce*, 1838, 1 Beav. 112; *Willson v. Leonard*, 1840, 3 Beav. 373; as explained in *Nokes v. Fish*, 1857, 3 Drew. 735.

(*i*) *Tichborne v. Weir*, 1892, 67 L. T. 735.

(*k*) *Haig v. Homan*, 1830, 4 Bli. N. S. 380; *Stone v. Evans*, 1797, Peake, Add. Cas. 94.

(*l*) *Gretton v. Diggles*, 1813, 4 Taunt. 766.

(*m*) *Williams v. Bosanquet*, 1819, 1 Br. & B. 238.

(*n*) *Nokes v. Fish*, 1857, 3 Drew. 735.

(*o*) *Sparkes v. Smith*, 1692, 2 Vern. 275.

(*p*) *White v. Hunt*, 1870, L. R. 6 Ex. 32; *Ringer v. Cann*, 1838, 3 M. & W. 343. (*q*) *Debenham v. Digby*, 1873, 28 L. T. 170.

(*r*) *Harrison v. Blackburn*, 1864, 17 C. B. N. S. 678.

(*s*) *Standen v. Christmas*, 1847, 10 Q. B. 135.

to enforce, or the liability for, collateral stipulations (*t*). For this purpose the landlord must consent to the substitution of the assignee in the place of the original tenant, so as to create a new contract between them upon the terms of the previous tenancy (*u*).

COVENANTS RUNNING WITH THE LAND.

Where covenants run with land.

In general the burden of a covenant affecting land does not run with the land at law so as to be binding upon successive holders (*x*), though such covenants, so far as they are restrictive (*y*), bind holders who take with notice of them (*z*). But in this respect the relation of landlord and tenant is exceptional (*a*), and the burden of covenants, both restrictive and positive, entered into by a lessee, may run with the land at law. Equally also the benefit of the covenant may run with the land in favour of assignees of the term.

(1) Where "assigns" are not mentioned.

In the following cases the burden and benefit of covenants pass with the land to the assignee:—Where a covenant in a demise of corporeal or incorporeal (*b*) hereditaments relates to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and bind the assignee, although he be not bound by express words (*c*). Of this kind are the following covenants:—Covenant by lessee to repair houses already built (*d*); to leave houses already built in repair (*e*); to repair and renew tenant's fixtures and machinery fixed to

(*t*) See judgment of Lush, J., in *Elliott v. Johnson*, 1866, L. R. 2 Q. B. p. 127.

(*u*) *Buckworth v. Simpson*, 1835, 1 C. M. & R. 834. See 21 Solicitors' Journal, 256.

(*x*) *Austerberry v. Corp. of Oldham*, 1885, 29 Ch. D. 750.

(*y*) *Austerberry v. Corp. of Oldham*, *supra*; *Haywood v. Brunswick Building Society*, 1881, 8 Q. B. D. 403; *L. & S. W. Ry. Co. v. Gomm*, 1882, 20 C. D. 562.

(*z*) *Tulk v. Moxhay*, 1848, 2 Ph. 774.

(*a*) See judgment of Lindley, L.J., in *Austerberry v. Corp. of Oldham*, *ubi sup.* p. 781.

(*b*) *Hooper v. Clark*, 1867, L. R. 2 Q. B. 200; *Martyn v. Williams*, 1857, 1 H. & N. 817.

(*c*) *Spencer's Case*, 1583, 5 Rep. 16 a; 1 Sm. L. C. 10th ed. 52.

(*d*) *Dean and Chapter of Windsor's Case*, 1601, 5 Rep. 24; *Wakefield v. Brown*, 1846, 9 Q. B. 209, 223.

(*e*) *Matures v. Westwood*, 1598, Cro. Eliz. 599; *Martyn v. Clue*, 1852, 18 Q. B. 661.

the premises (*f*); to pay rent (*g*) or to render services in the nature of rent (*h*); to allow deductions out of rent (*i*); not to plough more than a certain quantity of land (*k*); to manure the land (*l*); to reside upon the demised premises during the demise (*m*); to use a house as a private dwelling-house only (*n*); to insure against fire premises in London situate within the limits mentioned in stat. 14 Geo. 3, c. 78 (*o*); (in a mining lease) to pay compensation for damage done to the surface (*p*); covenant by lessor for quiet enjoyment (*q*) and for further assurance (*r*); to supply the houses demised with water (*s*); and, in a lease of a public-house, a covenant by the lessee to buy liquor from the lessor (*t*), and to conduct the house properly (*u*).

Where in a lease containing a covenant by the lessee of a public-house to take liquor from the lessor, his successors and assigns, there is a proviso for reduction of rent so long as the covenant is observed, and the reversion and the business devolve upon different persons, the lessee, since he continues bound by the covenant, is entitled to the benefit of the proviso, so long as he purchases liquor from the successors in the business (*r*).

Where a covenant relates to a thing not *in esse* at the time of the demise, yet if it directly touches or concerns the (2) Where "assigns" are mentioned.

(*f*) *Williams v. Earle*, 1868, L. R. 3 Q. B. 739; though not similar covenants as to movable chattels on the premises at the time of the demise: *S. C.*

(*g*) *Stevenson v. Lamhard*, 1802, 2 East, 575, 580; *Parker v. Webb* (circ.) 1700, 3 Salk. 5; *Williams v. Bosanquet*, 1819, 1 Br. & B. 238.

(*h*) *Vyvyan v. Arthur*, 1823, 1 B. & C. 410; see 2 My. & K. 541.

(*i*) *Baylye v. Hughes*, 1629, Cro. Car. 137.

(*k*) *Cockson v. Cock*, 1607, Cro. Jac. 125.

(*l*) *Sale v. Kitchingham*, 1714, 10 Mod. 158.

(*m*) *Tatem v. Chaplin*, 1793, 2 H. Bl. 133.

(*n*) *Wilkinson v. Rogers*, 1864, 2 De G. J. & S. 62.

(*o*) *Fernon v. Smith*, 1821, 5 B. & A. 1; on the ground that the lessor can require the insurance money to be spent in rebuilding. And so also, apparently, as to premises not in London; see *supra*, p. 360, note (*c*).

(*p*) *Norral v. Pascoe*, 1864, 34 L. J. Ch. 82.

(*q*) *Noke v. Awdler*, 1695, Cro. Eliz. 373, 436; *Campbell v. Lewis*, 1820, 3 B. & A. 392. See *Cole's Case*, 1692, 1 Salk. 196.

(*r*) *Middlemore v. Goodule*, 1639, Cro. Car. 503.

(*s*) *Jourdain v. Wilson*, 1821, 4 B. & A. 266; 2 Platt on Leases, 402.

(*t*) *Clegg v. Hands*, 1890, 44 C. D. 503.

(*u*) *Fleetwood v. Hull*, 1889, 23 Q. B. D. 35; *White v. Southend Hotel Co.*, 1897, 1 Ch. 767.

(*r*) *White v. Southend Hotel Co.*, *supra*.

thing demised (*x*), and the word *assigns* is used in the covenant, the assignee will be bound by, or may take advantage of it. The following covenants belong to this class:—Covenant to build a wall (*y*), or a house (*z*), on the demised premises; (in a mining lease) to build a smelting mill on waste land not demised, since it tends to the maintenance of the thing demised (*a*); to convey upon a railway, for making which land is demised, all coal got in a certain colliery (*b*); (in a demise of the right to kill game) to leave the land at the end of the term as well stocked with game as at the time of the demise (*c*); not to assign without the consent in writing of the lessor (*d*); to deliver up at the end of the term at a valuation fruit trees and bushes then growing (*e*).

Covenants
which will not
run with land.

If the thing to be done under the covenant be merely collateral to the land, and do not touch or concern the thing demised in any sort (*f*), the assignee shall not be charged (*g*). Hence the following covenants will not run with the land:—Covenant to build a house, not touching or concerning the land demised (*h*), upon land of the lessor which is not parcel of the demise (*g*); to pay a collateral sum to the lessor or to a stranger (*i*); to pay taxes on premises not demised (*j*); (in a lease of ground, with

(*x*) *Spencer's Case*, 1583, 5 Rep. 16 a; *Thomas v. Hayward*, 1869, L. R. 4 Ex. 311; *Mayor of Congleton v. Pattison*, 1808, 10 East, at p. 135; *Doughty v. Bowman*, 1848, 11 Q. B. 444, 454. Though in *Minshull v. Oakes*, 1858, 2 H. & N. 793, the distinction was questioned, and a covenant to repair new buildings, if erected, was held to bind assigns of the lessee though not mentioned. For a discussion of this case, see 1 Sm. L. C. 10th ed. p. 66.

(*y*) *Spencer's Case*, *supra*.

(*z*) *Doughty v. Bowman*, 1848, 11 Q. B. 444.

(*a*) *Simpson v. Easterby*, 1829, 9 B. & C. 505, 516; 6 Bing. 644. See *Bally v. Wells*, 1769, 3 Wils. 25.

(*b*) *Hemingway v. Fernandes*, 1842, 13 Sim. 228.

(*c*) *Hooper v. Clark*, 1867, L. R. 2 Q. B. 200.

(*d*) *Williams v. Earle*, 1868, L. R. 3 Q. B. 739; as explained by Blackburn, J., in *West v. Dobb*, 1869, 38 L. J. Q. B. at p. 291. See *Doe v. Smith*, 1814, 5 Taunt. 795.

(*e*) *Grey v. Cuthbertson*, 1785, 2 Chit. 482.

(*f*) *Thomas v. Hayward*, 1869, 38 L. J. Ex. at p. 176; L. R. 4 Ex. 311.

(*g*) *Spencer's Case*, 1583, 5 Rep. p. 16 a.

(*h*) *Simpson v. Easterby*, 1829, 9 B. & C. 505, 516.

(*i*) *Mayho v. Buckhurst*, 1618, Cro. Jac. 438; *Flight v. Glossop*, 1835, 2 Bing. N. C. 125 (agreement for use of boxes at theatre on payment of a collateral sum).

(*j*) *Gower v. Postmaster-General*, 1887, 57 L. T. 527.

liberty for the lessee to erect a mill) not to hire persons to work in the mill who were settled in other parishes without a certificate of the settlement of such persons (*k*); covenant by lessor to give the lessee an offer of pre-emption of an adjoining piece of ground (*l*); (in the lease of a beershop) not to build or keep any house for sale of spirits or beer within half-a-mile of the demised premises (*m*); condition for re-entry if the lessee or his assigns, or any occupier of the land demised, should at any time during the term be lawfully convicted of committing any offence against the game laws (*n*); covenant by the lessor to make a payment in respect of chattels substituted for chattels on the land at the time of the demise (*o*). The assignee is not liable on an agreement by the lessee subsequent to the lease to pay a percentage on the cost of additional buildings (*p*).

Quite irrespective of the question whether a covenant runs with the land at law, every holder of land (*q*) who takes it with notice of a previous contract affecting the user of the land, is bound to abstain from conduct which will be a violation of the contract (*r*), and such violation will be restrained by injunction (*s*); but a contract which is purely positive—which, for instance, involves the expenditure of money on repairs—will not be enforced on the ground of notice (*t*). Where a covenant is partly affirmative and partly negative, the negative part will in a proper case be enforced (*u*). A covenant giving to the lessor the exclusive right to supply beer to a public-house comprised in the lease is enforced by restraining the holder with notice from

Restrictive
covenants
binding on
ground of
notice.

(*k*) *Mayor of Congleton v. Pattison*, 1808, 10 East, 130. See *Walsh v. Fussell*, 1829, 6 Bing. 163.

(*l*) *Collison v. Lettson*, 1815, 6 Taunt. 224, 229.

(*m*) *Thomas v. Hayward*, 1869, L. R. 4 Ex. 311. Cf. *Kemp v. Bird*, 1877, 5 C. D. 974.

(*n*) *Stevens v. Copp*, 1868, L. R. 4 Ex. 20.

(*o*) *Gorton v. Gregory*, 1862, 3 B. & S. 90.

(*p*) *Lambert v. Norris*, 1837, 2 M. & W. 333.

(*q*) Although a mere occupier: *Mander v. Falck*, 1891, 2 Ch. 554.

(*r*) *De Mottos v. Gibson*, 1858, 4 De G. & J. 276, p. 282.

(*s*) *Tulk v. Moxhay*, 1848, 2 Ph. 774; *Wilson v. Hart*, 1866, 1 Ch. 463. *Keppell v. Bailey*, 1834, 2 My. & K. 517, so far as it is to the contrary, is overruled: *Luker v. Dennis*, 1877, 7 C. D. 227.

(*t*) *Supra*, p. 404.

(*u*) *Clegg v. Hands*, 1890, 44 C. D. 503.

purchasing beer elsewhere (*x*); and the covenant may be made to extend to premises other than those comprised in the lease from the brewer, so as to bind such other premises in the hands of an assign of the covenantor (*y*). The covenant is also enforced in favour of the assigns of the lessor, and it is not necessary that the assigns should carry on the business at the same place as the lessor, or should themselves make beer (*z*).

Building
estate.

A vendor of a building estate is entitled to enforce restrictive covenants relating to the user of a part of the estate, although he has sold the whole estate, if he remains liable to the purchasers of other parts of the estate to restrain the prohibited user (*a*). In general, also, the purchaser of another part of the estate can enforce the covenant (*b*), if he purchases on the faith of it (*bb*).

Flats.

The same principle applies to a building let out in flats, and the lessor who has let a flat for residential purposes will be restrained from turning the rest of the building into a club (*c*).

Underlessee.

An underlessee who has parted with possession of the premises, and is no party to an unlawful use of them, is not liable in equity at the suit of the lessor (*d*).

Notice of
restrictive
covenants.

An assignee or underlessee is expected to inquire into the title of his assignor or immediate lessor (*e*), and he is affected with constructive notice of any restrictive covenants he will discover on such inquiry (*f*), notwithstanding that he is by statute precluded from the inquiry except by

(*x*) See *Cutt v. Tourle*, 1869, 4 Ch. 654.

(*y*) *Luker v. Dennis*, 1877, 7 C. D. 227.

(*z*) *Clegg v. Hands*, 1890, 44 C. D. 503; *supra*, p. 340.

(*a*) *Spencer v. Bailey*, 1893, 69 L. T. 179.

(*b*) *Thorneycroft v. Johnson*, 1881, 50 L. J. Ch. 641. See *Renals v. Croulishaw*, 1879, 9 C. D. 125, 129; 11 C. D. 866, 869; *Nottingham Brick Co. v. Butler*, 1886, 15 Q. B. D. 261, 269; 16 Q. B. D. 778; *Spicer v. Martin*, 1888, 14 App. Cas. 12. And see *Holford v. Aeton District Council*, 1898, 2 Ch. 240; *Webb v. Fagotti Bros.*, 1898, 79 L. T. 589, 683; *Rogers v. Rosegood*, 1899, Times, Nov. 8.

(*bb*) See *Master v. Hansard*, 1876, 4 C. D. 718; *Re Birmingham, &c., Land Co. and Allday*, 1893, 1 Ch. 342.

(*c*) *Hudson v. Cripps*, 1896, 1 Ch. 265.

(*d*) *Hall v. Erwin*, 1887, 37 Ch. D. 74.

(*e*) *Parker v. Whyte*, 1863, 1 H. & M. 167.

(*f*) *Fielden v. Slater*, 1869, 7 Eq. 523.

special agreement (*g*). Under such a statutory prohibition he is in the same position as if before the statute he had stipulated not to inquire into the title (*g*). But where inquiry would in fact not have led to knowledge of the covenant in question, the person omitting to make the inquiry is not affected with notice (*h*).

The assignee may rid himself of all future liability to the lessor in respect of the rent (*i*) and covenants in the original lease, by re-assigning the lease to any person, though the assignee has been held liable in equity for the rent during the time he actually enjoys the land (*k*). He may do this without giving notice to the lessor, or obtaining his leave (*l*); and notwithstanding a covenant in the original lease, that the lessee, his executors or administrators, should not assign without the licence of the lessor (*m*). There is no fraud in the assignee of a lease re-assigning his interest with a view to get rid of the lease; hence he may re-assign it to a beggar (*n*), or a married woman (*o*), or a person leaving the kingdom (*p*), for the express purpose of relieving himself of liability under the covenants. And this may be done by a trustee in bankruptcy (*q*). It is not even necessary that the person to whom the re-assignment is made should take possession of the premises (*r*), or receive the lease (*n*). In one case it was held that a re-assignment of a lease might be lawfully made to a prisoner in the Fleet, who was paid a sum of money to accept of the assignment (*s*). But the assignment must be real (*t*), and it is not effectual if the assignee is merely the agent of the assignor (*u*).

Effect of re-assignment.

(*g*) *Patman v. Harland*, 1881, 17 C. D. 353; *Thornewell v. Johnson*, 1881, 50 L. J. Ch. 614. (*h*) *Carter v. Williams*, 1870, 9 Eq. 678.

(*i*) *Paul v. Nurse*, 1828, 8 B. & C. 486; *Odell v. Wake*, 1813, 3 Camp. 394; *Chancellor v. Poole*, 1781, 2 Dougl. 764; *Pitcher v. Tovey*, 1693, 1 Salk. 81. (*k*) *Truckle v. Coke*, 1683, 1 Vern. 164.

(*l*) *Valliant v. Dodemede*, 1742, 2 Atk. 546; *Le Keuc v. Nash*, 1745, 2 Stra. 1221; *Onslow v. Corrie*, 1817, 2 Madd. 330.

(*m*) *Paul v. Nurse*, 1828, 8 B. & C. 486.

(*n*) *Taylor v. Shum*, 1797, 1 B. & P. 21, 23. See *Odell v. Wake*, 1813, 3 Camp. 394. (*o*) *Barnfather v. Jordan*, 1780, 2 Dougl. 452.

(*p*) *Per Eyre, C.J.*, in *Taylor v. Shum*, 1797, 1 B. & P. at p. 23.

(*q*) *Hopkinson v. Lovering*, 1883, 11 Q. B. D. 92.

(*r*) *Walker v. Reeve*, 1781, 3 Dougl. 19.

(*s*) *Valliant v. Dodemede*, 1742, 2 Atk. 546.

(*t*) *Fugg v. Dobie*, 1838, 3 Y. & C. Ex. 96.

(*u*) *Philpot v. Hoare*, 1741, 2 Atk. 219.

Continued
liability of
lessee.

A *lessee*, however, cannot, by assigning his lease, rid himself of liability under the covenants. The effect of an assignment is to make the lessee a surety to the lessor for the assignee; who, as between himself and the lessor, is the principal, bound, whilst he is assignee, to pay the rent and perform the covenants running with the land (*x*). If the lessor, tacitly or expressly, accepts the assignee as his tenant, it appears that an action of *debt* for rent will not lie against the lessee (*y*); but if the lease contains an express covenant by the lessee, an action on such covenant may be brought against him or his executor (*z*) at any time during the term, notwithstanding the lessee has assigned his interest and parted with the possession of the premises, and the lessor has received rent from the assignee (*a*). The lessor may sue either the lessee or his assignee, or both at the same time, but he can only have execution against one of them (*z*).

2. Liability
of assignee
to lessee.

During the continuance of the interest of each successive assignee there is a duty on his part to pay the rent and perform the covenants (*b*). If the lessee, in his capacity of a surety as between himself and the assignee for the payment of rent and performance of covenants (*c*), has paid the rent or discharged the obligation, he has his remedy over against the principal (*d*); and he has the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each of them; for the lessee is in effect a surety for each of them to the lessor (*e*). And there is an implied promise

(*x*) See per Lord Denman in *Wolveridge v. Steward*, 1833, 1 Cr. & M. at p. 660. Per Parke, B., in *Humble v. Langston*, 1841, 7 M. & W. at p. 530.

(*y*) *Walker's Case*, 1587, 3 Rep. 22 a; *Auriol v. Mills*, 1790, 4 T. R. p. 98. See *Wadhams v. Marlowe*, 1785, 8 East. 314, note (*c*); 4 Dougl. 54.

(*z*) *Brett v. Cumberland*, 1617, Cro. Jac. 521. See *Bachelour v. Gage*, 1631, Cro. Car. 188.

(*a*) *Barnard v. Godscall*, 1613, Cro. Jac. 309. See *Auriol v. Mills*, 1790, 4 T. R. p. 98; *Staines v. Morris*, 1812, 1 V. & B. p. 11; *Orgill v. Kemshead*, 1812, 4 Taunt. 642.

(*b*) See *Wolveridge v. Steward*, 1833, 1 Cr. & M. at p. 659; *Moule v. Garrett*, 1870, L. R. 5 Ex. 132.

(*c*) Per Parke, B., in *Humble v. Langston*, 1841, 7 M. & W. p. 530.

(*d*) *Burnett v. Lynch*, 1826, 5 B. & C. 589. See judgment in *Wolveridge v. Steward*, 1 Cr. & M. at pp. 659, 660.

(*e*) Judgment in *Moule v. Garrett*, 1870, 39 L. J. Ex. at p. 73; *Wolveridge v. Steward*, 1833, 1 Cr. & M. at p. 660.

on the part of each successive assignee to indemnify the original lessee against breaches of covenant by each assignee during his tenancy, notwithstanding that he expressly covenants to indemnify his immediate assignor (*f*). The assignee is liable for a breach of any covenant running with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises (*g*).

Even where there is no assignment of the lease, but only an agreement to assign not under seal, the assignee will be liable for rent to the lessee as long as he is in possession (*h*), though not subsequently (*i*). But the lessee who has been compelled to pay rent cannot recover from the assignee's mortgagee by subdemise (*k*).

As a further protection against this continued liability, lessees, on assigning their leases, are entitled to require the assignees to indemnify them against future payment of rent and performance of covenants (*l*), and the assignee is, perhaps, liable on the covenant, if he takes possession, although he does not execute the assignment (*m*). Even executors, who cannot be compelled to enter into the ordinary covenants for title, may require a covenant of indemnity from their assignees (*l*). Upon a covenant of indemnity, contained in the assignment, the assignee will be liable to the lessee during the residue of the term, and he cannot relieve himself from this liability by re-assigning the lease. Substantial damages can be recovered by the lessee against the assignee in respect of a breach of a covenant to repair if the premises are found to be dilapidated at a date subsequent to re-assignment, although there is no direct evidence that the breach took place in his time (*n*); and the lessee can recover in respect of dilapidations prior to the assignment (*n*), especially if by reason of them he

Indemnity to
lessee.

(*f*) *Moule v. Garrett*, 1870, L. R. 5 Ex. 132; 1872, L. R. 7 Ex. 101.

(*g*) *Burnett v. Lyuch*, 1826, 5 B. & C. 589; *Harley v. King*, 1835, 2 Cr. M. & R. 18. (*h*) See *Groom v. Bluck*, 1841, 2 M. & Gr. 567.

(*i*) *Crouch v. Tregouning*, 1872, L. R. 7 Ex. 88.

(*k*) *Bonner v. Tottenham Building Society*, 1899, 1 Q. B. 161.

(*l*) *Staines v. Morris*, 1812, 1 V. & B. 8. See *Russell v. Shoolbred*, 1885, 29 C. D. 254. As to the construction of covenants of indemnity, see *Crossfield v. Morrison*, 1849, 7 C. B. 286; *Gooch v. Clutterbuck*, 1899, 47 W. R. 609.

(*m*) *Smith v. Peat*, 1853, 9 Ex. 161.

(*n*) *Gooch v. Clutterbuck*, 1899, 2 Q. B. 148.

obtained a smaller price, unless the covenant is expressly worded so as to exclude such liability (*o*). An assignee who has covenanted to indemnify the lessee against the covenants in the lease may, on re-assigning the lease, require a similar covenant from his assignee (*p*). But a covenant for indemnity cannot be enforced if the assignment was for an unlawful purpose (*q*).

Claim under
indemnity.

In an action by a lessee against the assignee of the lease for breach of a contract of indemnity, the lessee can recover as damages the entire costs properly incurred in reasonably, though unsuccessfully, defending an action by the lessor (*r*). But where the extent of the liability to the lessor has already been determined in an action brought by him against the lessee, an intermediate assignee ought to pay, and cannot recover against the ultimate assignee the costs of defending an action brought by the lessee (*s*). The judgment will provide only for past breaches (*t*). The claim of the lessee for indemnity against a bankrupt assignee is liable to be barred under sect. 30 of the Bankruptcy Act, 1883 (*u*), unless declared by the Court to be a liability incapable of being fairly estimated (*x*); and hence, as against the bankrupt, the lessee must prove and will only receive a dividend (*y*). But he may take an assignment from the trustee in the bankruptcy of a right of indemnity which the bankrupt has against a subsequent assignee, and he will then be able to recover in full against such subsequent assignee (*z*).

(5) *Grant by the Landlord of his Reversion.*

4 Anne, c. 16,
s. 9.

By 4 Anne, c. 16 (*a*), s. 9, it is provided that all grants or conveyances, of any manors or rents, or of the reversion

(*o*) *Hawkins v. Sherman*, 1828, 3 C. & P. 459.

(*p*) See *Staines v. Morris*, 1812, 1 V. & B. 8, 13.

(*q*) *Smith v. White*, 1866, L. R. 1 Eq. 626.

(*r*) *Howard v. Lovegrove*, 1870, L. R. 6 Ex. 43; *Murrell v. Fysh*, 1883, C. & E. 80. See *Cousins v. Phillips*, 1865, 3 H. & C. 892.

(*s*) *Smith v. Howell*, 1851, 6 Ex. 730.

(*t*) *Lloyd v. Dimmack*, 1877, 7 C. D. 398. (*u*) 46 & 47 Vict. c. 52.

(*x*) *Hardy v. Fothergill*, 1888, 13 A. C. 351. As to such a claim against a company in liquidation, see *Craig's Claim*, 1895, 1 Ch. 267.

(*y*) Under the Act of 1869, this liability was not provable: *Morgan v. Hardy*, 1886, 17 Q. B. D. 770.

(*z*) *Re Perkins, Poyser v. Beyfus*, 1898, 2 Ch. 182.

(*a*) In Revised Statutes, 4 & 5 Anne, c. 3.

or remainder of any messuages or lands, shall be good and effectual without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing, or upon whose estates any such reversions or remainders shall be expectant or depending.

Conveyances to be good without attornment of tenant.

No such tenant shall be prejudiced or damaged by payment of any rent to any such grantor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the grantee (*aa*).

Sect. 10.

Tenant not to be prejudiced by payment of rent to grantor before notice of grant.

Formerly a grant of the reversion was not effectual without the attornment of the tenant to the grantee, though it was otherwise with a devise of the reversion (*b*); but under the above enactment the grant is complete without attornment (*c*), and the assignee of the reversion can maintain ejectment for breach of covenant without giving the tenant notice of the assignment (*d*). Although the lease is not under seal, the tenant becomes tenant to the assignee without attornment, and holds upon the terms of the lease under which he entered (*e*). But the statute only applies where an estate remains in the tenant, and the assignee of the reversion cannot sue a yearly tenant by parol who, before the assignment of the reversion, has by deed assigned all his own estate and interest (*f*).

At common law neither the benefit nor the burden of covenants in a lease passed to the assignee of the reversion—in other words, ran with the reversion (*g*)—except, perhaps, covenants for the payment of rent or for the rendering of services (*h*); but the law was altered by 32 Hen. 8, c. 34, and the principle of this statute has been extended by the Conveyancing Act, 1881.

Where covenants run with reversion.

Upon a grant by a landlord of his reversion, the grantees “and the heirs, executors, successors and assigns of every of them, shall have like advantages against the lessees,

32 Hen. 8, c. 34, s. 1.

Grantees of reversion to have same remedies against lessees as lessors had.

(*aa*) See *Cook v. Moylan*, 1847, 1 Ex. 67.

(*b*) *Doe v. Smith*, 1838, 8 A. & E. p. 260.

(*c*) See *Doe v. Brown*, 1853, 2 E. & B. 331. *Cf. Edwards v. Wickwar*, 1866, 1 Eq. 403, where, however, 4 Anne, c. 16, s. 9, was not referred to: 35 L. J. Ch. 309 n.

(*d*) *Scaltock v. Harston*, 1875, 1 C. P. D. 106

(*e*) *Brydges v. Lewis*, 1842, 3 Q. B. 603.

(*f*) *Allcock v. Moorhouse*, 1882, 9 Q. B. D. 366.

(*g*) 1 Smith's L. C. 10th ed. 58.

(*h*) *Vivian v. Arthur*, 1823, 1 B. & C. 410.

their executors, administrators and assigns, by entry for non-payment of rent (*i*), or for doing of waste or other forfeiture; and the same remedies by action for not performing of other conditions, covenants or agreements contained in the indentures of their said leases as the said lessors themselves, or their heirs or successors had."

Sect. 2.

Lessees to have same remedy against grantees of reversion as they might have had against lessors.

All lessees of hereditaments for term of years, life or lives, their executors, administrators and assigns, shall have like remedy against all persons and bodies politic, their heirs, successors and assigns, who shall have any gift or grant of the reversion of the same hereditaments or any parcel thereof, for any condition, covenant or agreement contained in the indentures of their leases, as the same lessees might have had against the said lessors, their heirs and successors.

This statute applies only to cases where the lease is made by deed (*k*), and where the conditions or covenants touch or concern the land, so that, according to the rule already explained (*l*), they can run with the land for or against the lessee (*m*). If the lease is not under seal, the assignee of the reversion is not bound by its terms unless he has adopted them (*n*), as if with knowledge of the lease he receives rent (*o*); and, on the other hand, he does not take the benefit of the agreement, the right to sue on it remaining in the lessor (*p*). An agreement that the rent shall not be raised, or otherwise varying the rights of the parties, may be personal merely, and not binding on a purchaser of the reversion, whether with or without notice (*q*).

(*i*) As to the effect of the assignment of a term out of which an underlease has been granted, see *Franklin v. Howes*, 1871, 24 L. T. 348. As to sums reserved in respect of a way-leave, see *Lord Hastings v. North Eastern Ry. Co.*, 1898, 2 Ch. 674; affirmed, 1899, 1 Ch. 656.

(*k*) *Standen v. Christmas*, 1847, 10 Q. B. 135.

(*l*) *Supra*, p. 404. See *Fleetwood v. Hull*, 1889, 23 Q. B. D. 35. As to covenants to take liquor from the lessor, see cases cited, *supra*, p. 340.

(*m*) *Spencer's Case*, 1583, 5 Rep. 18 a (*ad finem*); *Stevens v. Copp*, 1868, L. R. 4 Ex. 20.

(*n*) *Smith v. Eggington*, 1874, L. R. 9 C. P. 145.

(*o*) *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 334; but an agreement by the lessor in an agricultural letting to pay the outgoing tenant for his property on the farm attaches to the owner for the time being: *Mansel v. Norton*, 1883, 22 C. D. 769.

(*p*) *Bickford v. Parson*, 1848, 5 C. B. 920, see p. 932.

(*q*) *Roberts v. Tregaskis*, 1878, 38 L. T. 176; *Phillips v. Miller*, 1875, L. R. 10 C. P. 420.

A covenant can run under the statute with the reversion on a term in incorporeal hereditaments (r). A covenant by the lessee, in a lease of sporting rights, to leave the land at the end of the term as well stocked with game as at the time of the demise, touches the hereditaments demised, and the assignee of the reversion can sue on it (s).

Where land which is in the occupation of a tenant is sold, the purchaser is bound to make inquiry as to the nature and extent of the tenant's interest (t). He has, therefore, constructive notice of the terms upon which the land is occupied (u); and the tenant holds under the purchaser on the same terms (x), and has against the purchaser the benefit of an option of renewal contained in his agreement (y). And this rule extends to a stipulation which is imported by a contract independent of the lease (t), unless it is merely personal (z). But the rule does not apply as between vendor and purchaser, and the vendor cannot enforce the contract if it turns out that a person stated to be a tenant has such a lease as will defeat the object of the purchaser (a).

Notice to the purchaser of terms of tenancies.

Where land which is subject to a lease is taken by a public company under its statutory powers, the company are not liable on the lessor's covenants for doing upon the land in pursuance of such powers acts which are in violation of the covenants (b). The proper course is for the lessee to make a claim under sect. 68 of the Lands Clauses Act, 1845, on the ground that his premises have been injuriously affected, and this he can do whether the lands have been taken compulsorily or by agreement (c).

Land taken under statutory powers.

(r) *Martyn v. Williams*, 1857, 1 H. & N. 817, 829; *Lord Hastings v. N. E. Ry. Co.*, 1898, 2 Ch. 674; affirmed, 1899, 1 Ch. 656.

(s) *Hooper v. Clark*, 1867, L. R. 2 Q. B. 200.

(t) *Allen v. Anthony*, 1816, 1 Mer. 282.

(u) *Daniels v. Davison*, 1809, 16 Ves. 249; *Coates v. Kenma*, 1872, Ir. R. 6 Eq. 401.

(x) *Greenwood v. Bairstow*, 1836, 5 L. J. Ch. 179.

(y) *Lewis v. Stephenson*, 1898, 78 L. T. 165. See *Richardson v. Sydenham*, 1703, 2 Vern. 447.

(z) *Supra*, p. 414.

(a) *Caballero v. Henty*, 1874, 9 Ch. 450; overruling *James v. Lichfield*, 1869, 9 Eq. 51.

(b) See *Baily v. De Crespigny*, 1869, L. R. 4 Q. B. 180; *Anderson v. M. S. & L. Ry. Co.*, 1898, 46 W. R. 509; affirmed, 1898, 2 Ch. 394.

(c) *Kirby v. Harrogate School Board*, 1896, 1 Ch. 437.

Covenants
run with
reversionary
estate.

Conv. Act,
1881, s. 10.

Sect. 11.

Under the stat. 32 Hen. 8, c. 34, it was necessary that the reversioner claiming the benefit of the covenant should be strictly the assignee of the legal owner with whom the covenant was made (*d*), though in the case of copyholds a surrenderee was treated as an assignee (*e*). Thus, in a lease by a mortgagor and mortgagee, the assigns of the mortgagee could not take advantage of covenants entered into with the mortgagor only (*f*), the right to sue remaining in the mortgagor (*g*). The difficulty also arose in cases where a remainderman sought to enforce a covenant contained in a lease made by the tenant for life under a power of leasing, though it was got over by treating the settlor from whom the power emanated as the real lessor, and the remainderman as his assignee (*h*). The necessity, however, for this strict tracing of the legal estate has been abolished by the Conveyancing Act, 1881, which by sect. 10 provides that the rent and the benefit of the lessee's covenants, and every condition of re-entry, shall go with the reversionary estate, and shall be enforceable by the person entitled, subject to the term, to the income of the land leased. The section applies where there has been a severance of the reversionary estate, and then the owner of each part of the estate takes the advantage of the rent, covenant and conditions so far as they relate to his part (*i*). Similarly sect. 11 makes the burden of the lessor's covenants, when entered into by a lessor having power to bind the reversionary estate, run with that estate so as to be enforceable against the person from time to time entitled to it (*k*). Both sections apply only to leases made after 31st December, 1881.

(*d*) See *E. of Derby v. Taylor*, 1801, 1 East, 502.

(*e*) *Whitton v. Peacock*, 1834, 3 My. & K. 325; *Glover v. Cope*, 1692, 3 Lev. 326; 4 Mod. 80.

(*f*) *Webb v. Russell*, 1789, 3 T. R. 393.

(*g*) *Russell v. Stokes*, 1791, 1 H. Bl. 562.

(*h*) *Isherwood v. Oldknor*, 1815, 3 M. & S. 382; *Greenaway v. Hart*, 1854, 14 C. B. 340. See *Whitlock's Case*, 1609, 8 Rep. p. 71 a.

(*i*) A plaintiff suing the lessee on the covenants in the lease must show what reversion he has, and how he derives title to it: *Davis v. James*, 1884, 26 C. D. 778. A demise by deed for a term longer than that of an existing tenancy transfers the reversion on the existing tenancy, and disentitles the original lessor to sue the original lessee for rent: *Harmer v. Bean*, 1853, 3 C. & K. 307. As to lessors who are tenants in common suing separately, see *Roberts v. Holland*, 1893, 1 Q. B. 665.

(*k*) As to whether the ultimate liability, in the case where the reversion

Under the stat. 32 Hen. 8, c. 34, the assignee of the reversion in part of the demised land was entitled to take advantage of a covenant (*l*), though not of a condition of re-entry, this not being apportionable by the act of the party (*m*). But an assignee of part of the reversion—as an assignee for years—could take advantage alike of covenants and conditions (*n*). A condition for non-payment of rent was made apportionable by 22 & 23 Vict. c. 35, s. 3, and by sect. 12 of the Conveyancing Act, 1881, conditions are now made apportionable generally, and the apportioned parts go respectively with the terms attached to the severed parts of the reversionary estate.

Apportion-
ment of
conditions.

The assignee of the reversion is not entitled under 32 Hen. 8, c. 34, to arrears of rent which became due before the assignment (*o*), or to sue for a breach of covenant committed before the assignment (*p*). But upon a covenant to repair on notice, if it is the assignee who gives notice, he may sue, although the premises were out of repair before the assignment (*q*). And though the assignee cannot sue for a breach of a contract to complete premises within a given time, where the breach was incurred before the assignment, he can sue on a covenant to keep them in repair (*r*).

Cause of
action arising
before assign-
ment.

SECT. II.—INVOLUNTARY ASSIGNMENTS.

(1) *On Death.*

Arrears of rent accrued and payable in the lifetime of the landlord go to his executor or administrator as part of his

1. Of lessor.

has devolved upon death, is upon the devisees of the reversion or on the personal estate of the deceased reversioners, see *Eccles v. Mills*, 1898, A. C. 360.

(*l*) *Turnham v. Pickard*, 1818, 2 B. & A. 105; *Budeley v. Vigurs*, 1854, 4 E. & B. 71; *Attoe v. Hemmings*, 1615, 2 Bulstr. 281.

(*m*) *Dunpor's Case*, 1583, 4 Rep. 119; 1 Sm. L. C. 10th ed. 31. See Co. Litt. 215 a; *Wright v. Burroughes*, 1846, 3 C. B. 685.

(*n*) *Wright v. Burroughes*, *supra*. See *Tuite v. Gosling*, 1879, 11 C. D. 273.

(*o*) *Flight v. Bentley*, 1835, 7 Sim. 149. So a judgment creditor on taking the land on *elegit* is not entitled to rent due before the execution is complete: *Sharp v. Key*, 1841, 8 M. & W. 379.

(*p*) *Johnson v. St. Peter's, Hereford*, 1836, 4 A. & E. 520; *Crane v. Batten*, 1854, 23 L. T. O. S. 220. See *Morris v. Kennedy*, 1896, 2 Ir. R. 247. And as to the persons entitled to sue after assignment, see *Green v. James*, 1840, 6 M. & W. 656.

(*q*) *Mascal's Case*, 1587, 1 Leon. 62.

(*r*) *Bennett v. Herring*, 1857, 3 C. B. N. S. 370.

personal estate (*s*). Executors may sue upon any covenant with the testator which has been broken in his lifetime (*t*). But where the covenant runs with the land and descends to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the heir is the proper plaintiff (*u*). In the first instance, however, the real estate of a deceased person now vests in his personal representatives, and while it so remains vested it is for them to pursue the remedies incident to existing leases (*x*).

2. Of lessee.

Upon the death of a tenant from year to year (*y*), or for a term of years, the lease vests in his executor or administrator (*z*). Even where a term of years is specifically bequeathed, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets are applied, and the legatee has no right to enter without the executor's special assent (*a*).

Executor's assent.

The executor's assent to a bequest of the term vests the term absolutely in the legatee so that he may recover it in an action at law (*b*); and, after an unconditional assent, the executor is not entitled to an indemnity out of the testator's general estate in respect of the covenants in the lease (*c*). An assent by an executor who does not prove the will is effectual, provided administration with the will annexed is afterwards taken out (*d*).

Evidence of assent.

The assent need not be express. An implied assent is effectual (*c*), but the evidence of assent must be affirmative. The mere lapse of time, or the fact that debts are paid, is

(*s*) See 1 Williams on Exors. 9th ed. p. 727; *Dollen v. Batt*, 1858, 4 C. B. N. S. 760.

(*t*) *Raymond v. Fitch*, 1835, 2 Cr. M. & R. 588, 598; *Ricketts v. Weaver*, 1844, 12 M. & W. 718.

(*u*) *Kingdon v. Nottle*, 1813, 1 M. & S. 355. See 2 Cr. M. & R. 598.

(*x*) *Supra*, p. 62.

(*y*) *Doe v. Porter*, 1789, 3 T. R. 13; *James v. Dean*, 1808, 15 Ves. at p. 241; *Doe v. Wood*, 1845, 14 M. & W. 682.

(*z*) *Ackland v. Pring*, 1841, 2 M. & Gr. p. 952. See *R. v. Inhabitants of Great Glenn*, 1833, 5 B. & Ad. 188. As to recovery from a stranger of rents of leasehold property received by him in the testator's lifetime, see *Wilkinson v. Carwood*, 1797, 3 Anst. 905.

(*a*) 1 Williams on Exors. 600.

(*b*) *Doe v. Guy*, 1802, 3 East, 120; *Re Culverhouse*, 1896, 2 Ch. 251.

(*c*) *Shadbolt v. Woodfall*, 1845, 2 Coll. 30.

(*d*) *Johnson v. Warwick*, 1856, 17 C. B. 516.

(*e*) *Doe v. Sturges*, 1816, 7 Taunt. 217.

not sufficient (*f*). The principle is that if an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that is taken as evidence of assent; but if his acts are referable to his character as executor, they are not evidence of an assent to the legacy (*g*).

Payments made by the executor for the benefit of the legatee of leaseholds, but not specifically on account of the rents, are not, in the absence of representations to the legatee, sufficient evidence of assent (*h*). Where, on the other hand, the executor pays the rent and charges it to the legatee, this is evidence of assent (*i*); and where the legatee is let into possession, and assumes the burdens of the lease, there is held to have been an assent (*k*). The executors may assent to a bequest of leaseholds as part of a residue, without assenting to the bequest of the whole residue (*k*).

Where the bequest is to the executor himself, either absolutely or for life, he still takes as executor in the first instance, and assent is necessary to complete his title as legatee (*l*). An entry and enjoyment by the executor, accompanied by any act of beneficial ownership, such as disposing of the term by will, shows his election to take as legatee (*m*). And so, too, the payment of a sum of money charged on the term in the hands of the legatee (*n*); or the discharge of duties attached to the bequest, such as the maintenance and education of children (*o*). Where the bequest is to the executor absolutely, his mere entry gives assent; but where he takes for life, something more than entry is required (*p*).

Bequest to
executor.

The executor or administrator cannot, generally speaking, refuse the lease, though it be worth nothing, for he must renounce the executorship *in toto* or not at all (*q*); but if

Executor's
refusal of
lease.

(*f*) *Hawkins v. Williams*, 1862, 10 W. R. 692.

(*g*) *Doe v. Sturges*, 7 Taunt. p. 223.

(*h*) *Thorne v. Thorne*, 1893, 3 Ch. 196.

(*i*) *Doe v. Mabblerley*, 1833, 6 C. & P. 126.

(*k*) *Austin v. Beddoe*, 1893, 41 W. R. 619.

(*l*) *Young v. Holmes*, 1718, 1 Str. 70.

(*m*) *Fenton v. Olegg*, 1854, 9 Ex. 680.

(*n*) *Young v. Holmes*, *supra*.

(*o*) *Paramour v. Yardley*, 1579, Plowd. 539.

(*p*) *Doe v. Sturges*, 1816, 7 Taunt. 217, p. 221.

(*q*) Per Denman, C.J., in *Rubery v. Stevens*, 1832, 4 B. & Ad. at p. 244.

the value of the land is less than the rent, and there is a deficiency of assets, he may waive the lease (*r*).

Executor's liability.

i. For rent and breaches during life of testator.

ii. After death of testator.

Entry necessary to make executor liable.

The executor (or administrator) is liable, to the extent of the assets, for arrears of rent accruing and breaches of covenant committed during the life of the tenant (*s*).

With respect to rent accruing due and breaches of covenant committed after the death of the tenant, the liability of the executor depends upon special considerations.

An executor, even though merely an executor *de son tort* (*t*), takes as assignee; but, unlike other assignees, who are liable to the lessor before entry (*u*), the executor is only liable as assignee after he has entered and actually taken possession of the demised premises (*x*). But he may be sued as assignee simply, and it is for him specially to plead his non-entry (*y*). When he is sued and cannot make use of the plea of non-entry, he is *primâ facie* liable for rent due and breaches of covenant committed subsequently to the death of the lessee, and this liability must be satisfied *de bonis propriis* (*z*). So, where executors by occupying and paying rent become yearly tenants, they are under an implied agreement to abide by the terms of the original contract (*a*). Where, however, the executor is sued as executor, judgment will only be *de bonis testatoris* whether for rent (*b*), or for breach of covenant generally (*c*); and hence *plene administravit* will be a good plea (*c*). Specific

(*r*) 2 Williams on Exors. 9th ed. 1637. See *Wilkinson v. Curwood*, 1797, 3 Aust. 905, per Macdonald, C.B., at p. 909; *Stephens v. Hotham*, 1855, 1 K. & J. 571, p. 575.

(*s*) 2 Williams on Exors. 1632.

(*t*) *Paull v. Simpson*, 1846, 9 Q. B. 365; *Williams v. Heales*, 1874, L. R. 9 C. P. 177.

(*u*) *Walker v. Reeve*, 1781, 3 Doug. 19; *Williams v. Bosanquet*, 1819, 1 Br. & B. 238. Where one of two executors enters, the other is not by such entry made liable for use and occupation: *Nation v. Tozer*, 1834, 1 Cr. M. & R. 172.

(*x*) *Rendall v. Andrew*, 1892, 61 L. J. Q. B. 630; *Kearsley v. Osley*, 1864, 2 H. & C. 896, p. 904. See *Helier v. Casebert*, 1664, 1 Lev. 127; *Horse v. Webster*, 1608, Yelv. 103.

(*y*) *Wollaston v. Hakewill*, 1841, 3 M. & Gr. 297, 321; *Green v. Listoncell*, 1840, 2 Ir. L. R. 384.

(*z*) *Tilney v. Norris*, 1701, 1 Ld. Raym. 553; *Buckley v. Pirk*, 1711, 1 Salk. 316.

(*a*) *Buckworth v. Simpson*, 1835, 1 Cr. M. & R. 834.

(*b*) *Buckley v. Pirk*, *supra*; *Lyddall v. Dunlapp*, 1742, 1 Wils. 4. See *Hargrave's Case*, 1600, 5 Rep. 31 a.

(*c*) *Wilson v. Wigg*, 1808, 10 East, 313.

performance of a covenant in a lease to take a renewed lease will be decreed against the lessee's executors who have entered and who admit assets; but the renewed lease, if not beneficial, will be so framed as not to impose personal liability on the executors (*d*).

But though the executor is sued as assignee, and *primâ facie* is liable personally, yet by pleading specially he can discharge himself, if the demised premises are of less value than the rent. If the land is of greater value than the rent, the lessor is entitled to be paid out of the profits, and the executor cannot discharge himself by a plea of *plene administravit* (*e*). But if the rent is of greater value than the land, the executor may exonerate himself by pleading this fact specially (*f*), and he can limit his personal liability for rent to the yearly value of the premises (*g*)—that is, the amount of rent for which they could have been let (*h*). But it seems that he cannot after entry limit his liability for breaches of other covenants than the covenant to pay rent, such, for example, as the covenant to repair (*i*).

How executor
avoids
liability.

The result is that the executor may be sued as assignee for rent due and breaches of covenant committed subsequently to the death of the lessee; but he can discharge himself from all personal liability by alleging that he is no otherwise assignee than by being executor or administrator of the lessee, and that he has never entered or taken possession of the demised premises; and if he has entered, he can, by pleading that the yearly value of the premises is less than the rent reserved, limit his liability for rent to the amount of such yearly value. If he is sued as executor, he may discharge himself by alleging that the term is of no value, and that he has fully administered all the assets which have come to his hands (*k*). The lessor is not entitled to

(*d*) *Stephens v. Hotham*, 1855, 1 K. & J. 571.

(*e*) *Buckley v. Pirk*, 1711, 1 Salk. 316.

(*f*) *Buckley v. Pirk*, *supra*; *Billinghurst v. Speerman*, 1696, 1 Salk. 297.

(*g*) *Rendall v. Andrae*, 1892, 61 L. J. Q. B. 630. See 1 Wms. Saund. 112, note (*c*); *Rubery v. Stevens*, 1832, 4 B. & Ad. 241, 245; *Hopwood v. Whaley*, 1848, 6 C. B. 744; *Hornidge v. Wilson*, 1840, 11 A. & E. 645.

(*h*) *Hopwood v. Whaley*, *supra*; *E. of Strathmore v. Fane*, 1887, 37 C. D. 128.

(*i*) *Rendall v. Andrae*, 1892, 61 L. J. Q. B. 630; *Treemeere v. Morison*, 1834, 1 Bing. N. C. 89, 97; *Sleap v. Newman*, 1862, 12 C. B. N. S. 116. See *Reid v. Teenderden*, 1833, 4 Tyr. 111.

(*k*) *Wollaston v. Hakewill*, 1841, 3 M. & Gr. p. 321.

have the assets impounded to answer the future rent and covenants (*l*).

Use and
occupation.

When an executor is sued for use and occupation in his own right, he must show that his occupation is as executor, and that he entered in that character; that he has no assets, and that the value of the land is not equal to the rent. Where the land yields some profit, but less than the rent, he may tender the amount of profit and plead a tender, or he may pay it into Court (*m*).

Assignment
by executor.

The executor can, like any other assignee, free himself from personal liability for future rent and breaches of covenant by assigning the term (*n*), though, if the testator was the original lessee, the assets in his hands remain liable (*o*). Moreover, by following the course provided by 22 & 23 Vict. c. 35, s. 27 (*p*)—*i.e.* by satisfying all liabilities accrued due and claimed, and setting apart a sufficient fund to answer any future claim in respect of any fixed sum covenanted to be laid out on the property—he can by such assignment avoid liability for all claims which have not then been made.

The estate of the lessee remains liable notwithstanding that the lessee has assigned in his lifetime and the lessor has received rent from the assignee (*q*). But where the testator was himself an assignee of the lease, the executor can terminate the liability of the estate by assigning, and it seems that if the rent exceeds the yearly value it is his duty to attempt to do so (*r*). The executor of the assignee can plead *plene administravit* to an action by the lessee for indemnity (*s*).

(*l*) *King v. Maltott*, 1852, 9 Hare, 692.

(*m*) *Patten v. Reid*, 1862, 6 L. T. 281.

(*n*) *Taylor v. Shum*, 1797, 1 B. & P. 21; *Goodland v. Ewing*, 1883, C. & E. 43, see note p. 44.

(*o*) *Helier v. Casebert*, 1664, 1 Lev. 127; 1 Sid. 266; *Coghil v. Freeiore*, 1691, 3 Mod. 325; *Pitcher v. Tovey*, 1692, 4 Mod. 71, 76.

(*p*) Since this statute it appears that the indemnity to which an executor was formerly entitled in respect of leaseholds (see *King v. Maltott*, 1852, 9 Hare, p. 695) has become unnecessary. See *Williams on Executors*, 9th ed. II. 1204, note (*l*); *Dodson v. Sammell*, 1861, 1 Dr. & Sm. 575.

(*q*) *Brett v. Cumberland*, 1619, Cro. Jac. 521. See *Bachelour v. Gage*, 1631, Cro. Car. 188. On a lease to lessees jointly with a joint and several covenant for rent, the estate of a deceased lessee remains liable, notwithstanding that his interest has ceased: *Burns v. Bryan*, 1887, 12 App. Cas. 184.

(*r*) *Roxley v. Adams*, 1838, 4 M. & Cr. 534.

(*s*) *Collins v. Crouch*, 1849, 13 Q. B. 542.

The executor is not personally liable for the consequences of neglect to insure in pursuance of a covenant, where the insurance expired in the testator's life (*t*). Liability for non-insurance.

(2) *On Bankruptcy of Lessee.*

Under the Bankruptcy Act, 1883 (*u*), the leaseholds held by a bankrupt beneficially at the date of the bankruptcy vest absolutely in the trustee, subject to the power of disclaiming under sect. 55. This result does not depend upon the election of the trustee to take them (*x*), nor is it prevented by a restriction on assignment (*y*). Hence the trustee, as an assign of the lease, is personally liable under the covenants as from the date when the lease vests in him: that is, from the date of his appointment (*x*). Like any other assignee, he can put an end to his liability by assigning the premises over (*z*); and, provided the assignment is real, he may assign to a pauper for the express purpose of ridding himself of liability (*a*). The trustee may avoid future liability by assignment, notwithstanding that the lease contains a covenant against assigning without licence which purports to bind assignees in law (*b*). A release of the trustee under sect. 82 of the Act will secure him against any claim made by the lessee in the bankruptcy, but not, perhaps, against claims prosecuted in any other jurisdiction (*c*). The trustee is entitled to be indemnified out of the estate of the bankrupt (*d*). Liability of trustee.

An option to call on the landlord to grant a lease passes, on the bankruptcy of the tenant, to the trustee, and may be assigned over by him (*e*). The bankrupt is entitled to dispose of leasehold property acquired by him after the After-acquired property.

(*t*) *Fry v. Fry*, 1859, 27 Beav. p. 146.

(*u*) 46 & 47 Vict. c. 52. See sects. 54, 168.

(*x*) *Wilson v. Wallani*, 1880, 5 Ex. D. 155, 163; *Titterton v. Cooper*, 1882, 9 Q. B. D. 473. See *Ex parte Dressler*, 1878, 9 C. D. 252.

(*y*) *Doe v. Smith*, 1814, 5 Taunt. 795; *Doe v. Bevan*, 1815, 3 M. & S. 353. See *Wadhams v. Marlowe*, 1785, 8 East, 314, note (*c*).

(*z*) See *Wilkins v. Fry*, 1816, 1 Mer. p. 265.

(*a*) *Hopkinson v. Loring*, 1883, 11 Q. B. D. 92; *Onslow v. Corrie*, 1817, 2 Madd. 330. (*b*) *Re Johnson*, 1894, 70 L. T. 381.

(*c*) *Ex parte Carter*, 1878, 8 C. D. 731; *Ex parte Barnard*, 1882, 46 L. T. 824.

(*d*) *Lowrey v. Barker*, 1880, 5 Ex. D. p. 173.

(*e*) *Buckland v. Papillon*, 1866, L. R. 2 Ch. 67.

bankruptcy and before his discharge, until the trustee intervenes to claim it (*f*).

Disclaimer.

Under sect. 55 of the Bankruptcy Act, 1883, the trustee may disclaim leaseholds of the bankrupt, by writing signed by him, at any time within twelve months (*h*) after the first appointment of a trustee (*i*), or, where the property does not come to the knowledge of the trustee within one month after such appointment, at any time within twelve months after he becomes aware of it (*k*). A Crown lease can be disclaimed (*l*). The trustee can disclaim, notwithstanding that the lease has been determined by expiration of time or by forfeiture between his appointment and the disclaimer; and perhaps, also, where it has been determined before his appointment (*m*). The disclaimer should be signed by the trustee in person (*n*).

Effect of disclaimer.

The disclaimer operates to determine as from the date of disclaimer the rights, interests, and liabilities of the bankrupt and his property in, or in respect of, the property disclaimed; and also discharges the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him; but does not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person (*o*).

Under the disclaimer the trustee gives up to the lessor the entirety of the property comprised in the demise. Hence, if land and chattels are leased at an entire rent, the

(*f*) *Re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.

(*h*) Bank. Act, 1890, s. 13. The period may be extended by the court: *ibid.*; some good reason being shown: *Re Price*, 1884, 13 Q. B. D. 466.

(*i*) Bank. Act, 1883, s. 55, sub-sect. (1).

(*k*) For the effect of a prior contract of sale by bankrupt, see *Re Maughan*, 1885, 14 Q. B. D. 956; *Ex parte Edmonds*, 1883, 48 L. T. 77. Where the bankrupt has mortgaged, see *Re Gee*, 1889, 24 Q. B. D. 65; and *cf. Re Wilson*, 1871, 13 Eq. 186.

(*l*) *Re Thomas*, 1888, 21 Q. B. D. 380.

(*m*) *Ex parte Dyke*, 1882, 22 C. D. 410. See *Ex parte Paterson*, 1879, 11 C. D. 908.

(*n*) *Wilson v. Wallani*, 1880, 5 Ex. D. 155. But see *Re Whitley Partners*, 1886, 32 C. D. 337.

(*o*) Sect. 55, sub-sect. (2). This provision states explicitly the construction placed on sect. 23 of the Bankruptcy Act, 1869: *Ex parte Walton*, 1881, 17 C. D. 746; *Hill v. E. & W. India Dock Co.* 1884, 9 App. Cas. 448 (where bankrupt is an assignee, the liability of the original lessee is unaffected); *Harding v. Preece*, 1882, 9 Q. B. D. 281 (surety for bankrupt).

trustee cannot retain the chattels under the reputed ownership clause (*p*). And since the lease is at an end so far as the bankrupt and his estate are concerned, the trustee cannot take advantage of provisions relating to the determination of the tenancy (*q*); thus he cannot remove trade buildings and machinery under a provision authorizing such removal (*r*), unless the Court permits the removal under sub-sect.(3). But the trustee cannot rely upon the disclaimer as justifying acts which he has previously committed in violation of the tenant's obligations, as the removal of hay, where this is forbidden by the custom of the country (*s*). In general, however, the disclaimer relieves the trustee from all liability (*t*), and he is not liable for rent prior to the disclaimer, either as assignee, or on an implied contract of tenancy, or as trespasser (*u*).

Where a sum becomes due from the landlord to the tenant for allowances at the determination of the tenancy, the landlord cannot, as against the trustee, set off arrears of rent accrued due before the bankruptcy (*x*); unless, indeed, by the custom of the country, the landlord pays only the amount of the valuation less arrears of rent (*y*). Similarly the landlord cannot set off sums due for breaches of covenant by the bankrupt (*z*). Set-off.

Save in cases prescribed by general rules, the trustee cannot disclaim without the leave of the Court, and the Court can impose terms as to fixtures and other matters arising out of the tenancy (*a*). The cases so prescribed are as follows:—(1) Cases where the bankrupt has not sublet or mortgaged, and (a) the rent is less than 20*l.*, or Leave to disclaim.

(*p*) *Ex parte Allen*, 1882, 20 C. D. 341.

(*q*) *Ex parte Dyke*, 1882, 22 C. D. 410.

(*r*) *Ex parte Glegg*, 1881, 19 C. D. 7. See *Ex parte Stephens*, 1877, 7 C. D. 127.

(*s*) *Schofield v. Hincks*, 1888, 58 L. J. Q. B. 147.

(*t*) *Ex parte Allen*, 1882, 20 C. D. 341.

(*u*) *Lowrey v. Barker*, 1880, 5 Ex. D. p. 173; *Gabriel v. Blankenstern*, 1884, 13 Q. B. D. 684. (*x*) *Alloway v. Steere*, 1882, 10 Q. B. D. 22.

(*y*) *Re Wilson*, 1893, 62 L. J. Q. B. 628.

(*z*) *Ex parte Dyke*, 1882, 22 C. D. 410.

(*a*) Sect. 55, sub-sect. (3). As to granting leave, see *Ex parte E. & W. India Dock Co.*, 1881, 17 C. D. 759; *Ex parte Baston*, 1880, 15 C. D. 289; and as to appeal, *Re Woods*, 1876, 3 C. D. 459; *Ex parte Sadler*, 1881, 19 C. D. 122; *Ex parte E. & W. India Dock Co.*, *supra*; as to applying for leave after lapse of twelve months, *Re Baker*, 1891, 8 Morr. 116; as

(b) the estate is being administered under sect. 121 of the Act, or (c) the lessor does not, upon notice to disclaim being served upon him, require the matter to be brought before the Court; and (2) where the bankrupt has sublet or mortgaged, and neither the lessor nor the sublessee or mortgagee, upon notice to disclaim being served upon them, requires the matter to be brought before the Court (b).

Terms of
disclaimer.

In such cases, since the trustee disclaims without leave, there is no opportunity for terms to be imposed on him, and he cannot be called upon to pay rent to the lessor, notwithstanding that he may have been in beneficial occupation of the premises for the purpose of the bankruptcy (c). But where the Court grants leave to disclaim, and the trustee's occupation has resulted in benefit to the bankrupt's estate (d), or, although no actual benefit has resulted, if the occupation was with a view to benefit (e), the trustee is required, as a condition of disclaiming, to pay rent in respect of the occupation (f). Under the Act of 1869 the disclaimer was valid as between the trustee and the lessor, notwithstanding the failure to obtain leave (g); but, under the existing practice, a disclaimer without leave, where leave is required, is for all purposes void (b).

Notice to
disclaim.

Any person interested in the property may call upon the trustee to decide whether he will disclaim or not, and the trustee must then within twenty-eight days, or within such extended period as may be allowed by the Court, give his decision (h). The notice calling on the trustee to decide

to including several properties in same application, *Re Whitaker*, 1888, 21 Q. B. D. 261; as to trustee's costs, *Re Proctor*, 1891, 8 Morr. 251. Notice of motion may be served out of the jurisdiction, *Re Rathbone*, 1887, 56 L. J. Q. B. 504. As to lease of chattels, see *Sheffield Wagon Co. v. Stratton*, 1878, 48 L. J. Q. B. 35. (b) Bank. Rules, r. 320.

(c) *Re Sandwell*, 1885, 14 Q. B. D. 960.

(d) *Ex parte Izard*, 1883, 23 C. D. 115; *Re Zappert*, 1884, 1 Morr. 72; *Re Brooke*, 1884, 1 Morr. 82.

(e) *Ex parte Isherwood*, 1882, 22 C. D. p. 395; *Ex parte Arnal*, 1883, 24 C. D. 26; *Ex parte Good*, 1884, 13 Q. B. D. 731, 735.

(f) For refusal of leave where the trustee has acted for parties with opposing interests, see *Re Crowther*, 1887, 4 Morr. 100; and for the considerations applicable where the bankrupt was tenant under an attornment clause in a mortgage deed, see *Ex parte Isherwood*, 1882, 22 C. D. 384.

(g) *Reed v. Harvey*, 1880, 5 Q. B. D. 184. See *Ex parte Ludbury*, 1881, 17 C. D. 532.

(h) Sect. 55, sub-sect. (4).

may be given by the landlord (*i*), and it must be actually received by the trustee (*k*). The trustee, if he requires an extension of time, should, in the absence of special circumstances (*l*), apply to the Court before the twenty-eight days have expired (*m*).

If the trustee disclaims, any person interested in the property, or under liability in respect of it, may apply (*n*) for an order vesting the property in him (*o*). An underlessee or mortgagee of the bankrupt, taking under a vesting order, must take the property on the terms of being subject to the same liabilities and obligations as the bankrupt was subject to at the date when the bankruptcy petition was filed. If he declines to accept such an order, he is excluded from all interest in the property. The lessor is, for the purpose of this provision, a person claiming an interest in the disclaimed property (*p*), and he may apply, therefore, for an order requiring an underlessee or mortgagee to take the property, with the liabilities and obligations of the lease, or to be excluded (*q*).

Vesting
order.

Under the above sub-section it was considered doubtful whether the person in whom the lease was thus vested was liable as an original lessee, or only as an assign (*r*). Under sect. 13 of the Bankruptcy Act, 1890, he may be made liable as an assign only. But this power will be exercised only under special circumstances, and in general the vesting order requires the person in whose favour it is made to take upon himself the burden of the unperformed obligations, both past and future, to which the bankrupt was liable (*s*). A mortgagee cannot escape liability by assigning to a nominee (*t*).

Liability
under vesting
order.

(*i*) *Ex parte Mackay*, 1884, 14 Q. B. D. 401.

(*k*) *Reed v. Harvey*, 5 Q. B. D. 184.

(*l*) *Ex parte Lovering*, 1874, 9 Ch. 586; *Ex parte Moore*, 1876, 2 C. D. 802.

(*m*) *Re Richardson*, 1880, 16 C. D. 613.

(*n*) As to the parties on whom notice of the application should be served, see *Re Morgan*, 1889, 22 Q. B. D. 592.

(*o*) Sect. 55, sub-sect. (6). Payment of rent by a mortgagee in possession may create a tenancy from year to year, although the lease has been disclaimed by the trustee in bankruptcy of the mortgagor: *Jump v. Payne*, 1899, 68 L. J. Q. B. 607.

(*p*) *Re Finley*, 1888, 21 Q. B. D. 475; *Ex parte Shilson*, 1887, 29 Q. B. D. 343.

(*q*) See *Re Britton*, 1889, 61 L. T. 52.

(*r*) *Re Finley*, *ubi sup.* at p. 487.

(*s*) *Re Walker*, 1895, 72 L. T. 330.

(*t*) *Re Smith*, 1890, 25 Q. B. D. 536.

Damages.

A person injured by the operation of a disclaimer can prove in the bankruptcy for the amount of his loss (*u*). The measure of damages in respect of rent is the difference between the rent due under the lease for the residue of the term and the rent that can now be obtained (*x*) ; it includes also the sum required to leave the property in the same state as if the covenants had been properly performed (*y*). Where the assignee of a repairing lease had become bankrupt, and his trustee had disclaimed the premises, which had become depreciated in letting value, the assignor was allowed, under his covenant of indemnity, to prove as damages (i.) two quarters' rent from the date of disclaimer to give time to repair and re-let, (ii.) the diminution in letting value for the residue of the term, and (iii.) the amount of the dilapidations (*z*). Where the lease is determinable at any of several periods, it is to be taken, for the purpose of assessing damages, as though it would have been determined at the earliest period (*y*). If the lease was to partners as joint tenants, who gave a joint and several covenant for payment of rent, the lessor can prove against the separate estate of each partner, though perhaps not against the joint estate (*a*).

(3) *On Conviction of Lessee for Treason or Felony.*

By the Forfeiture Act, 1870 (*b*), "convict" is defined to mean any person against whom judgment of death or of penal servitude has been pronounced upon any charge of treason or felony (*c*), and an administrator of the property of a convict may be appointed (*d*).

33 & 34 Vict.,
c. 25, s. 10.

Property of
convict to
vest in
administrator.

Upon the appointment of any administrator, all the real and personal property, including *choses in action*, to which the convict named in such appointment was, at the time of his conviction, or shall afterwards, while he shall continue

(*u*) Sect. 55, sub-sect. (7).

(*x*) *Re Llynvi Coal Co.*, 1871, 7 Ch. 28.

(*y*) *Ex parte Blake*, 1879, 11 C. D. 572.

(*z*) *Re Carruthers*, 1895, 2 Man. 172.

(*a*) *Ex parte Corbett*, 1880, 14 C. D. 122.

(*b*) 33 & 34 Vict. c. 23.

(*c*) Sect. 6.

(*d*) Sect. 9.

subject to the operation of the Act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein.

The administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit. Sect. 12.

The administrator may cause payment or satisfaction to be made out of such property of any debt or liability of such convict which may be established in due course of law, or may otherwise be proved to his satisfaction. Sect. 14.

CHAPTER VI.

DETERMINATION OF THE TENANCY.

	PAGE
SECT. I. MODES APPLICABLE TO PARTICULAR KINDS OF TENANCY	430
(1) Determination of tenancy at sufferance	430
(2) Determination of tenancy at will	431
Express	431
Implied	432
(3) Determination of tenancy from year to year	433
(i) When determinable	433
(ii) Notice to quit	434
(a) Length of notice	434
(b) Reckoning of period.	436
(c) Form of notice	440
(d) By whom notice may be given.	443
(e) To whom notice is to be given	445
(f) Mode of service	445
(g) Waiver of notice	447
(iii) Verbal disclaimer	449
(4) Determination of tenancies for terms of years	450
Tenancies for optional terms	450
(5) Determination of tenancies for life	451
SECT. II. MODES GENERALLY APPLICABLE	452
(1) Merger	452
(2) Surrender	454
Express	454
Implied	455
Rent after surrender	460
Operation of surrender on rights of third persons	460
Surrender for purpose of renewal	461
(3) Forfeiture	462
(i) Where there is no express proviso for re-entry	462
(ii) Where there is an express proviso	464
Demand of rent	465
Re-entry	467
(iii) Waiver of forfeiture.	468
(iv) Relief against forfeiture	472
(a) Under the Conveyancing Act, 1881	472
(b) In respect of non-payment of rent.	476
(c) In other cases	476

SECT. I.—MODES APPLICABLE TO PARTICULAR KINDS OF TENANCY.

(1) DETERMINATION OF TENANCY AT SUFFERANCE.

TENANCY at sufferance may be determined at any time by landlord or tenant without any demand of possession or notice to quit (*a*).

(*a*) *Doe v. Turner*, 1840, 7 M. & W. at p. 235; *Doe v. Lawder*, 1816,

(2) DETERMINATION OF TENANCY AT WILL.

Every lease at will must in law be at the will of both parties, and therefore when the lease is made to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also (*b*). In general, accordingly, the tenancy continues until the will of either party has been determined, and intimation given to the other party. Thus the landlord cannot recover in ejectment against his tenant at will unless he has demanded possession (*c*). A notice, though couched as a notice to quit, does not necessarily recognize a subsisting tenancy from year to year, but may be a mere demand of possession (*d*).

1. Express determination.

Where on a letting at will rent is reserved payable quarterly, it has been held that the landlord terminating the tenancy within the quarter loses the rent, but the tenant terminating the tenancy pays (*e*). Though now, under the Apportionment Act, 1870 (*f*), it seems that in either case an apportioned rent would be payable.

The landlord may determine a tenancy at will expressly, by stating his will to be that the tenant shall leave (*g*), or by demanding possession (*h*),* or sending for the keys (*i*). Anything which amounts to a demand of possession, although not expressed in precise and formal language, will indicate the landlord's will to determine the tenancy (*j*); hence a letter from the agent of the landlord to the agent of the tenant, stating that, unless the tenant pays what he owes, the landlord will take immediate measures to recover possession of the property, is a sufficient intimation that

By landlord.

1 Stark. 308. See *Doe v. Murrell*, 1837, 8 C. & P. 134; *Wallis v. Delmar*, 1860, 29 L. J. Ex. 276. And as to possession taken pending completion of a sale or negotiations for a lease, see *Doe v. Sayer*, 1811, 3 Camp. 8; *Doe v. Quigley*, 1810, 2 Camp. 505.

(*b*) Co. Litt. 55 a.

(*c*) *Goodtitle v. Herbert*, 1792, 4 T. R. 680. See *Denn v. Rawlins*, 1808, 10 East. 261.

(*d*) *Doe v. Inglis*, 1810, 3 Taunt. 54.

(*e*) *Leighton v. Theed*, 1702, 2 Salk. 413.

(*f*) *Supra*, p. 213.

(*g*) *Pollen v. Brewer*, 1859, 7 C. B. N. S. 371, 373.

(*h*) *Doe v. Jones*, 1830, 10 B. & C. 718, 721; *Doe v. McKaeg*, 1830, 10 B. & C. 721.

(*i*) *Pollen v. Brewer*, *supra*.

(*j*) Judgment of Tindal, C.J., in *Doe v. Price*, 1832, 9 Bing. at p. 358. See *Locke v. Matthews*, 1863, 13 C. B. N. S. 753.

the tenancy is to determine (*k*). By words spoken off the demised premises the will is not determined until the lessee has notice (*l*).

By tenant.

The tenant may expressly determine the tenancy by declaring that he will no longer hold possession of the premises, and quitting them accordingly; but the mere declaration will not produce this effect (*m*).

2. Implied determination.

By landlord.

The landlord may impliedly determine a tenancy at will by acts showing an intention that it should no longer exist; as, for instance, by making a lease of the premises to another, to commence presently (*n*); or by doing what, but for the determination of the will, would be wrongful, as entering upon the land to retake possession (*o*), or going there, without the tenant's consent, to cut and carry away trees or stone (*p*), provided such trees and stone are not excepted from the demise (*q*); or by agreeing to sell the freehold to the tenant (*r*).

A conveyance of the reversion operates as a determination of a tenancy at will, if the tenant has notice of it (*s*); and the bankruptcy of the landlord has the same effect by reason of the vesting of the reversion in the trustee (*t*). Where the act by which the intention of the landlord to determine the tenancy is manifested is done on the demised premises, it is presumed that the tenant is there and knows of it; but if the act relied upon be done off the premises, it is requisite that the landlord should give the tenant notice that he determines the tenancy (*u*).

By tenant.

The tenant may impliedly determine the tenancy at will by granting an underlease (*x*), or assigning the premises

(*k*) See note (*j*), p. 431.

(*l*) Co. Litt. 55 b.

(*m*) Co. Litt. 55 b, note 373.

(*n*) *Dinsdale v. Hes*, 1674, 2 Lev. 88; *Hogan v. Hand*, 1861, 14 Moo. P. C. 310.

(*o*) See *Wallis v. Delmar*, 1860, 29 L. J. Ex. 276.

(*p*) *Doe v. Turner*, 1840, 7 M. & W. 226; 9 M. & W. 643.

(*q*) Co. Litt. 55 b.

(*r*) See judgment of Lord Eldon, C., in *Daniels v. Davison*, 1809, 16 Ves. at p. 252.

(*s*) *Doe v. Thomas*, 1851, 6 Ex. 854. See *Doe v. Davies*, 1851, 7 Ex. 89.

(*t*) *Doe v. Thomas*, *supra*.

(*u*) Per Parke, B., in *Pinhorn v. Souster*, 1853, 8 Ex. p. 770. See *Bull v. Cullimore*, 1835, 2 Cr. M. & R. 120.

(*x*) *Birch v. Wright*, 1786, 1 T. R. p. 382.

(provided the landlord has notice) (*y*) ; or by committing waste (*z*).

The general doctrine is that the death of either landlord or tenant will operate as a determination of the will (*a*) ; but it has been suggested that a tenancy at will may continue after the death of one of the parties, unless the heir, or legal representative, does something to manifest his intention to determine the tenancy (*b*). The death of the mortgagor is a determination of his tenancy at will under the mortgagee (*c*).

(3) DETERMINATION OF TENANCY FROM YEAR TO YEAR.

(i.) *When determinable.*

A tenancy from year to year may be determined at the end of the first or any subsequent year (*d*) ; unless, in creating the tenancy, the parties use expressions showing that they contemplate a tenancy for two years at least (*e*). A tenancy "for one year certain, and so on from year to year," cannot be determined before the end of the second year (*f*) ; and if it is for one year certain, with a specified notice to quit afterwards, notice cannot be given for the end of the first year (*g*).

Tenancy from
year to year.

A lease to A. B., his executors, administrators and assigns, for a year, and so on from year to year, for so long as it shall please the lessor and A. B., his executors, administrators or assigns, does not expire on the death of A. B., but vests in his executors (*h*).

(*y*) *Pinhorn v. Souster*, 1853, 8 Ex. 763, 772. See *Carpenter v. Colins*, 1606, Yelv. 73.

(*z*) Co. Litt. 57 a.

(*a*) *James v. Dean*, 1805, 11 Ves. at p. 391 ; Co. Litt. 57 b. See *Doe v. Rock*, 1842, Car. & M. 549, 553.

(*b*) Judgment in *Morton v. Woods*, 1869, L. R. 4 Q. B. at p. 306.

(*c*) *Turner v. Barnes*, 1862, 2 B. & S. 435 ; *Scobie v. Collins*, 1895, 1 Q. B. 375.

(*d*) *Doe v. Smaridge*, 1845, 7 Q. B. 957.

(*e*) *Doe v. Smaridge*, 7 Q. B. p. 959. See *Denn v. Cartwright*, 1803, 4 East, 29 ; *Doe v. Mainby*, 1847, 10 Q. B. 473.

(*f*) *Doe v. Green*, 1839, 9 A. & E. 658 ; *Reg. v. Chawton*, 1841, 1 Q. B. 247. See Bac. Abr. (L. 3), 838.

(*g*) *Thompson v. Maberley*, 1811, 2 Camp. 573, is to the contrary, but it was questioned in *Gardner v. Ingram*, 1889, 61 L. T. 729 (agreement for five years, determinable after the expiration of three years on a specified notice). See *Jones v. Nixon*, 1862, 1 H. & C. 48 ; *Cannon Brewery Co., Ltd. v. Nash*, 1898, 14 T. L. R. 158.

(*h*) *Mackay v. Muckreth*, 1785, 4 Dougl. 213.

Where the tenant is to go on at a lower rent if the premises cannot be let at the old rent, he is bound to allow inspection to an intending tenant (*i*).

(ii.) *Notice to quit.*

Where notice
required.

A yearly tenancy is determined by notice to quit given by either party to the other (*k*), but it may be stipulated that, upon a particular event, the lessee may quit without notice (*l*). An undertenant is not justified in leaving without notice merely through fear of distress by the superior landlord (*m*). But notice is not required if the tenancy is invalid as against the owner *pro tempore*; thus formerly tenant by *elegit* was not required to give notice to a tenant who came in after the judgment (*n*). Notice need not be given to an occupier who is in as a servant, and not as a tenant, when he is required to leave on the termination of his service (*o*).

Non-payment of rent for a long time may be presumptive evidence of the determination of a tenancy from year to year (*p*).

(a) LENGTH OF NOTICE.

1. Where
there is no
express agree-
ment.

Where no express stipulation is made between the parties as to the length of notice required to be given, it seems that this may be regulated by custom (*q*); but there must be strong evidence of such custom (*r*).

Half-year's
notice.

If no such custom exists, reasonable notice to quit must be given (*s*), and it is settled that the reasonable notice to

(*i*) *Doe v. Hunt*, 1836, 1 M. & W. 690.

(*k*) See notes to *Duppa v. Mayo*, 1 Wms. Saund. ed. 1871, 385, &c.; notes to *Clayton v. Blakey*, 2 Sm. L. C. 10th ed. p. 127, &c.; and Bull. N. P. 96, notes (*c*) and (*a*). The notice may be given on Sunday: *Sangster v. Noy*, 1867, 16 L. T. 157.

(*l*) *Bethell v. Blencowe*, 1841, 3 M. & Gr. 119.

(*m*) *Rickett v. Tullick*, 1833, 6 C. & P. 66.

(*n*) *Doe v. Hilder*, 1819, 2 B. & A. 782, see p. 785. But now the tenant's title would be good if he came in before registration of the writ: Land Charges Registration Act, 1888 (51 & 52 Vict. c. 51); Judgments Act, 1864 (27 & 28 Vict. c. 112).

(*o*) *R. v. Inhabs. of Cheshunt*, 1818, 1 B. & A. 473; *Doe v. Derry*, 1840, 9 C. & P. 494; *Mayhew v. Suttle*, 1854, 4 E. & B. 347. See *Doe v. Miles*, 1816, 1 Stark. 181. (*p*) *Stagg v. Wyatt*, 1838, 2 Jur. 892.

(*q*) *Roe v. Wilkinson*, 1773, cited in note 228 to Co. Litt. 270 b. See *Roe v. Charnock*, 1790, Peake, N. P. C. 4; also judgment in *Doe v. Snowden*, 1779, 2 W. Bl. at p. 1225; *Tyley v. Seed*, 1697, Skin. 649.

(*r*) *Roe v. Charnock*, Peake, at p. 5.

(*s*) *Doe v. Watts*, 1797, 7 T. R. per Lord Kenyon, p. 85.

which a tenant from year to year is entitled is half-a-year's notice (*t*), expiring at the end of some current year of the tenancy (*u*), notwithstanding the rent is reserved quarterly (*x*). The rule applies also to the case of notice given by an executor (*y*), and to the case of an infant who becomes entitled to the reversion of an estate leased from year to year (*z*).

The above general rule is varied in the case of agricultural holdings (*a*) by the Agricultural Holdings Act, 1883:—

Agricultural holdings.

Where a half-year's notice, expiring with a year of tenancy, is by law (*b*) necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of the Act, a year's notice so expiring is by virtue of the Act to be necessary and sufficient for the same; unless the landlord and tenant of the holding, by writing under their hands, agree that the section shall not apply, in which case a half-year's notice is to continue to be sufficient: but nothing in the section is to extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

46 & 47 Vict. c. 61, s. 33.

There is some uncertainty as to the length of the notice required to determine a quarterly, monthly, or weekly tenancy. A weekly tenancy does not determine without notice at the end of each week, and it is clear that some notice is required to determine it (*c*). Apparently also the

Short tenancies.

(*t*) *Right v. Darby*, 1786, 1 T. R. p. 163; *Birch v. Wright*, 1786, 1 T. R. p. 379; *Maddon v. White*, 1787, 2 T. R. 159; *Doe v. Porter*, 1789, 3 T. R. p. 17.

(*u*) Judgment of Erle, C.J., in *Bridges v. Potts*, 1864, 17 C. B. N. S. p. 332. (*x*) *Shirley v. Newman*, 1795, 1 Esp. 266.

(*y*) *Gulliver v. Burr*, 1766, 1 W. Bl. 596.

(*z*) *Maddon v. White*, 1787, 2 T. R. 159.

(*a*) Sect. 54; and see *infra*, p. 502.

(*b*) Where the parties have expressly agreed for half-a-year's notice, the notice is not regulated *by law*, and it seems that the section is excluded: *Barlow v. Teal*, 1885, 15 Q. B. D. 501. If the agreement is for six months' notice, it is also excluded on the ground that such a notice is not half-a-year's notice: *Wilkinson v. Culvert*, 1878, 3 C. P. D. 360. To exclude the section in cases where it would *primâ facie* apply, the parties must specifically agree in writing to that effect.

(*c*) *Bowen v. Anderson*, 1894, 1 Q. B. 164; *Jones v. Mills*, 1861, 10 C. B. N. S. 788. See per Parke, B., in *Huffell v. Armitstead*, 1835, 7 C. & P. p. 58; *Doe v. Hazell*, 1794, 1 Esp. 94; *Doe v. Raffan*, 1796, 6 Esp. 4.

notice should be a week's notice (*d*), and so in a quarterly tenancy a quarter's notice (*e*), and in a monthly tenancy a month's notice should be given (*f*).

2. Where there is an express agreement.

The parties to the tenancy may arrange the notice necessary to determine it; thus, they may agree that a three months' notice, or even a week's notice, shall be sufficient (*g*); and there is no objection to a tenancy being created which is to be determined by a week's notice to quit, with an allowance of a reasonable time after the expiration of the notice for the tenant to remove his goods (*h*).

The parties may also stipulate that the notice shall expire at any period of the year (*i*). Where there is no express or implied stipulation, the notice agreed upon between the parties must be given so as to expire at the end of some current year of the tenancy (*k*). Thus, an agreement by a tenant from year to year to quit at a quarter's notice, means a quarter's notice expiring at the end of some year of the tenancy (*k*); though a three months' notice seems to allow of the notice being given for the expiration of any quarter reckoning from the date of entry (*l*).

(b) RECKONING OF PERIOD OF NOTICE.

In strictness half-a-year is 182 days (*m*), and where the tenancy commences between two quarter-days, this is the period of the notice (*n*), the number of days being reckoned

(*d*) *Harvey v. Copeland*, 1892, 30 L. R. Ir. 412.

(*e*) *Towne v. Campbell*, 1847, 3 C. B. 921. See *Wilkinson v. Hall*, 1837, 3 Bing. N. C. 508, p. 531.

(*f*) *Beamish v. Cox*, 1885, 16 L. R. Ir. 270, 458. See per Williams, J., in *Jones v. Mills*, 1861, 10 C. B. N. S. p. 798.

(*g*) Judgment of Erle, C.J., in *Bridges v. Potts*, 1864, 17 C. B. N. S. p. 333.

(*h*) *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 334. In *Vint v. Constable*, 1871, 25 L. T. 324, a custom was set up for the tenant of a stone quarry to remain after the expiry of a notice to quit to get the stone he had "bared," but the evidence failed to establish it.

(*i*) See *Bridges v. Potts*, 1864, 17 C. B. N. S. 333; *Doe v. Grafton*, 1852, 18 Q. B. 496; *Collett v. Curling*, 1847, 10 Q. B. 785; *Re Threlfall*, 1880, 16 C. D. 274; *King v. Eversfield*, 1897, 2 Q. B. 475.

(*k*) *Doe v. Donovan*, 1809, 1 Taunt. 555; 2 Camp. 78; *Brown v. Burtinshaw*, 1826, 7 D. & Ry. 603. See *Bridges v. Potts*, *supra*; *Cadby v. Martinez*, 1840, 11 A. & E. 720.

(*l*) *Kemp v. Derrett*, 1814, 3 Camp. 510.

(*m*) Co. Litt. 135 b.

(*n*) 1 Wms. Saund. ed. 1871, p. 386.

by including one extreme and excluding the other (*o*). But where the tenancy commences on a quarter-day, a notice reckoned by a customary half-year is both sufficient (*p*) and necessary. Thus, notice on the 29th September to quit on 25th March is good, though the interval is only 177 days (*q*). And notice on the 26th March to quit on the 29th September will not do, though the interval is 187 days (*r*). So where a tenancy commencing on one of the ordinary feast-days is expressly made determinable on six months' notice, this means a customary six months; that is, from one of the usual quarter-days to the next but one following, although such six months should exceed or fall short of the number of days which constitute half-a-year (*s*). Where six calendar months' notice is to be given, the requirement must be strictly followed, notwithstanding that by the custom of the country a shorter period constitutes a half-year (*t*). But ordinarily "month" means lunar month (*u*).

As already stated, the half-year's notice must ordinarily expire at the end of a year of the tenancy (*x*), and a notice given to quit at a date subsequent to the expiration of the year is bad. Following out this rule strictly, a notice to determine on 19th May a tenancy beginning on that day in a previous year would be bad; for the whole of the first 19th May would be reckoned in the year (*y*), and hence a subsequent 18th May would be the last day, and notice should be given for this date (*z*); though, if the tenancy commenced *from* 19th May, that date would be excluded (*a*),

Expiration
of notice.

(*o*) *Sidebotham v. Holland*, 1895, 1 Q. B. 378, per Lindley, L.J., at p. 384; *Quartermaine v. Selby*, 1889, 5 T. L. R. 223.

(*p*) *Roe v. Doe*, 1830, 6 Bing. 574; *Doe v. Green*, 1803, 4 Esp. 198.

(*q*) 1 Wms. Saund. p. 386; *Doe v. Green*, *supra*.

(*r*) *Right v. Darby*, 1786, 1 T. R. 159; *Morgan v. Davies*, 1878, 3 C. P. D. 260.

(*s*) *Morgan v. Davies*, *supra*.

(*t*) *Travers v. Mason*, 1896, 45 W. R. 77.

(*u*) *Johnstone v. Huilstone*, 1825, 4 B. & C. p. 932. See *Rogers v. Kingston Dock Co.*, 1864, 34 L. J. Ch. 165, judgment of Wood, V.-C., p. 166.

(*x*) *Doe v. Grafton*, 1852, 18 Q. B. 496. See per Lord Campbell, C.J., and Erle, J., pp. 501, 502; *Doe v. Lea*, 1809, 11 East, 312.

(*y*) *Clayton's Case*, 1586, 5 Rep. 1 a.

(*z*) *Sidebotham v. Holland*, 1895, 1 Q. B. 378, judgment of A. L. Smith, L.J.

(*a*) *Clayton's Case*, *supra*.

and notice for an ensuing 19th May would be good. This refinement, however, has not been adopted, and whether the term commences "on" or "from" a given date, notice may be effectually given for any anniversary of that date (*b*). And notice must be to quit on that day generally, not at any particular hour before the end of the day (*c*). Any difficulty as to the exact date should be avoided by framing the notice in the usual alternative form (*d*).

Weekly
tenancy.

Where a weekly tenancy begins on Thursday, notice should be served for that day, though notice to quit on or before Friday in a subsequent week is probably good (*e*). The difficulty may be overcome, as in the case of a yearly tenancy, by giving the notice in a general form; that is, to quit at the end of the tenancy next after a week from the date of the notice (*f*).

Period with
reference to
which notice
must be given.

The implied condition as to the notice expiring at the end of some year of the tenancy renders it important that the time of commencement of the tenancy should be correctly ascertained. The question at what period a tenancy began is a matter for the decision of a jury, upon a consideration of all the facts (*g*). If the tenant alleges that a notice to quit given to him does not correspond with the time at which his tenancy commenced, it is incumbent on him to prove the true time of commencement (*h*). Where the commencement of a tenancy was on Old Michaelmas-day, a notice to quit at Michaelmas was held to mean Old Style, and was therefore good (*i*).

Admissions by
tenant.

When a tenant, on being applied to respecting the commencement of his holding, informs the person making the inquiry that it begins on a certain day, and notice to quit on that day is given at a subsequent time, the tenant will not be allowed to set up a holding from a different

(*b*) *Sidebotham v. Holland*, 1895, 1 Q. B. 378.

(*c*) *Page v. Moore*, 1850, 15 Q. B. 684.

(*d*) *Infra*, p. 442; *Sidebotham v. Holland*, judgment of A. L. Smith, L.J., *ubi sup.*, p. 389.

(*e*) *Harvey v. Copeland*, 1892, 30 L. R. Ir. 412. So held by Johnson and O'Brien, JJ.; Gibson, J., *diss.*

(*f*) *Doe v. Scott*, 1830, 6 Bing. 362.

(*g*) *Walker v. Godd*, 1861, 6 H. & N. 594; *supra*, p. 97.

(*h*) *Doe v. Wrightman*, 1801, 4 Esp. p. 7.

(*i*) *Denn v. Walker*, 1800, Peake, Add. Cas. 194; *Doe v. Vince*, 1809, 2 Camp. 256; *Doe v. Perrin*, 1840, 9 C. & P. 467. See *Furley v. Wood*, 1794, 1 Esp. 198.

day (*k*). It makes no difference whether the information so given proceeds from mistake or design (*h*). The mere notice to quit, at a certain time, given by the landlord, is not, in itself, evidence of a holding from that time (*l*); but if it be served personally on the tenant, and he make no objection at the time, this is *primâ facie* evidence from which a jury may find that the tenancy commenced at the period specified in the notice (*m*). The tenant, however, is not precluded from afterwards insisting on the insufficiency of the notice (*n*). And a tenant who by mistake gives notice for an earlier period than the end of the year is not bound by the notice, although it is accepted by the landlord (*o*).

Where a tenant continues in possession after the expiration of his lease without having entered into any new contract, he holds upon the former terms as to the time of quitting (*p*). If, whilst holding over, he assigns his interest, the tenancy of the assignee will also be held to commence on the same day as the original lease (*q*). But if the lease has already been assigned, so that it is the assignee and not the original lessee who holds over, it seems that the yearly tenancy arising on payment of rent commences on the expiration of the lease (*r*).

Where tenant keeps possession after expiration of lease.

A void lease or agreement, under which a tenant has entered and paid rent, will regulate the terms on which the tenancy subsists, including the time of the year when the tenant is to quit (*s*). If, subsequently to the expiration of the term fixed by the void lease or agreement, the tenant goes on paying rent, the tenancy from year to year thus arising will be determinable by notice to quit expiring at the

Where tenant enters under void lease.

(*k*) *Doe v. Lambley*, 1798, 2 Esp. 635.

(*l*) Per Lord Ellenborough, C.J., in *Doe v. Forster*, 1811, 13 East, p. 406.

(*m*) *Doe v. Forster*, 13 East, 405; *Doe v. Woombswell*, 1811, 2 Camp. 559; *Thomas v. Thomas*, 1811, 2 Camp. 647; *Doe v. Biggs*, 1809, 2 Taunt. 109.

(*n*) *Oakapple v. Copous*, 1791, 4 T. R. 361.

(*o*) *Doe v. Milward*, 1838, 3 M. & W. 328.

(*p*) See *Doe v. Bell*, 1793, 5 T. R. p. 472; *Roe v. Ward*, 1789, 1 H. Bl. 96; *Doe v. Weller*, 1798, 7 T. R. 478. See *Doe v. Dobell*, 1841, 1 Q. B. 806; *Humphreys v. Franks*, 1856, 18 C. B. 323; *Kelly v. Patterson*, 1874, L. R. 9 C. P. 681 (see this case as to holding over by an underlessee against the lessor); *Sinmons v. Underwood*, 1897, 76 L. T. 777.

(*q*) *Doe v. Samuel*, 1805, 5 Esp. 173.

(*r*) *Doe v. Lines*, 1848, 11 Q. B. 402.

(*s*) *Doe v. Bell*, 1793, 5 T. R. 471.

time of his original entry (*t*). But no notice to quit is necessary at the expiration of the term originally contemplated by the agreement or lease (*u*). A stipulation for two years' notice cannot be incorporated in a yearly tenancy arising upon occupation under an agreement for a lease (*x*).

Where tenant enters between two quarter-days.

Where a tenant from year to year, having entered in the middle of a quarter, pays rent to the next quarter-day, and thenceforth from quarter to quarter, his tenancy is held to commence on the quarter-day after his entry (*y*). Where he has not paid rent for the fraction of a quarter, the period of his entry is taken to be the time of commencement of his tenancy (*z*); unless the agreement specifies a quarter-day as the day for the first payment of rent (*a*).

Where tenant enters on different parts of demised premises at different times.

In cases where the incoming tenant enters upon different parts of the demised premises at different times, it is sufficient to give half-a-year's notice to quit before the substantial time of entry (*b*); *i.e.* the time of entry on the principal part of the premises. In these cases, the question of what is the principal, and what the accessory, must depend upon the relative value and importance of the premises let together, and is a matter for the decision of a jury (*c*).

(c) FORM OF NOTICE.

The notice to quit should show when the premises are to be given up (*d*), but it may be expressed in general terms, requiring the tenant to quit at the end of the current year of his tenancy which shall expire next after the end of one

(*t*) See judgment of Coltman, J., in *Berrey v. Lindley*, 1841, 3 M. & Gr. 498, p. 513.

(*u*) *Doe v. Stratton*, 1828, 4 Bing. 446; *Tress v. Savage*, 1854, 4 E. & B. 36; *Doe v. Moffatt*, 1850, 15 Q. B. 257. See *Sauvage v. Dupuis*, 1811, 3 Taunt. 410.

(*x*) *Tooker v. Smith*, 1857, 1 H. & N. 732.

(*y*) *Doe v. Johnson*, 1806, 6 Esp. 10; *Doe v. Stapleton*, 1828, 3 C. & P. 275.

(*z*) *Doe v. Matthews*, 1851, 11 C. B. 675.

(*a*) *Sandill v. Franklin*, 1875, L. R. 10 C. P. 377.

(*b*) See judgment of Lord Ellenborough, C.J., in *Doe v. Watkins*, 1806, 7 East, p. 555; *Doe v. Snowden*, 1779, 2 W. Bl. 1224; *Doe v. Spence*, 1805, 6 East, 120, 123; *Doe v. Hughes*, 1840, 7 M. & W. 139; *Doe v. Rhodes*, 1843, 11 M. & W. 600.

(*c*) *Doe v. Howard*, 1809, 11 East, 498, 501.

(*d*) *Goode v. Howells*, 1838, 4 M. & W. p. 201.

half-year from the date of the notice (*e*), and to avoid any question as to the exact day of determination of the tenancy the notice is usually expressed in the alternative (*f*). A notice to quit “at the expiration of the present year’s tenancy” is sufficient, although it is not apparent on the face of the notice that it was given six months before the period for quitting (*g*). An obvious mistake in the notice will be corrected; thus, notice served at Michaelmas, 1795, to quit at Lady-day, 1795, was held good for Lady-day, 1796 (*h*); and a possible but absurd construction of the notice will be rejected in favour of one which will make the notice effectual (*i*). But a notice to quit at the end of the current year of the tenancy served within six months of the date of determination is not construed as a notice for the end of the following year (*k*). A notice to quit on one of two days is good, if served six months before the day on which the tenancy commenced (*l*). Where the tenant simply gives notice of his desire to quit, the sufficiency of the notice may be aided by the reply of the landlord pointing out when the notice will take effect (*m*).

It is not essential that a notice to quit should be in writing (*n*)—at least where the tenancy is by parol (*o*)—or that it should state to whom possession is to be delivered up (*p*), though, if this is stated, it should be done with certainty. A notice to give up possession to “the rector and churchwardens for the time being” has been held bad for uncertainty (*q*).

An error in the description of the premises will not invalidate the notice if the person to whom it is given has not been misled by it (*r*), and a mistake in the christian

(*e*) *Doe v. Butler*, 1798, 2 Esp. 589; *Doe v. Steel*, 1811, 3 Camp. at p. 117; *Doe v. Smith*, 1836, 5 A. & E. 350.

(*f*) See *Sidebotham v. Holland*, 1895, 1 Q. B. p. 389.

(*g*) *Doe v. Timothy*, 1847, 2 C. & K. 351.

(*h*) *Doe v. Kightly*, 1796, 7 T. R. 63.

(*i*) *Doe v. Culliford*, 1824, 4 D. & Ry. 248.

(*k*) *Doe v. Morphet*, 1845, 7 Q. B. 577; *Mills v. Goff*, 1845, 14 M. & W. 72.

(*l*) *Doe v. Wrightman*, 1801, 4 Esp. p. 6.

(*m*) *General Assurance Co. v. Worsley*, 1895, 72 L. T. 358.

(*n*) *Doe v. Crick*, 1805, 5 Esp. 196.

(*o*) *Bird v. Debonville*, 1846, 2 C. & K. 415; *Roe v. Pierce*, 1809, 2 Camp. 96.

(*p*) *Doe v. Foster*, 1846, 3 C. B. 215.

(*q*) *Doe v. Fairclough*, 1817, 6 M. & S. 40.

(*r*) *Doe v. Roe*, 1803, 4 Esp. 185; *Doe v. Wilkinson*, 1840, 12 A. & E. 743.

Notice to
quit part of
premises.

name of the tenant will not be fatal if the notice is kept by him without objection (*s*). A notice to quit a part only of premises leased together is void (*t*), and none the less that the landlord has sold the reversion to the rest (*u*); but in the case of agricultural holdings a landlord is allowed, under sect. 41 of the Agricultural Holdings Act, 1883 (*x*), to resume possession of a part only of the holding for any of the purposes specified in the section, subject to the conditions imposed by the section.

Certainty in
notice.

The notice must be expressed with reasonable certainty. Thus a notice to quit if a breach of covenant is committed (*y*), or upon a contingency (*z*), is bad. And the notice is bad if it leaves it uncertain whether the tenant contemplates a surrender rather than a determination of the tenancy by notice (*a*). It was formerly considered that a notice was not effectual which gave the tenant an option either to go, or to stay at an increased rent (*b*); though the tenant, if he stayed, was bound to pay the increased rent (*c*). A

(*s*) *Doe v. Spiller*, 1807, 6 Esp. 70.

(*t*) *Doe v. Archer*, 1811, 14 East, 245.

(*u*) *Prince v. Evans*, 1874, 29 L. T. 835. See *Doe v. Church*, 1811, 3 Camp. 71. A notice to quit, given by, or on behalf of, the landlord, may be in the following form, the words between brackets being used when the notice is by an agent :—

To Mr. C. D.

I hereby [*as agent for and on behalf of Mr. E. F., your landlord*] give you notice to quit and deliver up possession of the premises, situate at —, in the county of —, which you now hold of me [*him*] as tenant thereof, on the — day of — next, or at the expiration of the year of your tenancy thereof, which shall expire next after the end of one half-year from the service of this notice. Dated the — day of —, 18—. E. F.

[*R. S., agent for the said E. F.*]

A notice to quit, given by, or on behalf of, the tenant, may be in the following form, the words between brackets being used when the notice is by an agent :—

To Mr. E. F.

I hereby [*as agent for and on behalf of Mr. C. D., your tenant*] give you notice that on the — day of — next I shall [*he will*] quit and deliver up possession of the premises situate at —, in the county of —, which I [*he*] now hold [*holds*] of you as tenant thereof. Dated the — day of —, 18—. C. D.

[*R. S., agent for the said C. D.*]

(*x*) 46 & 47 Vict. c. 61.

(*y*) *Muskett v. Hill*, 1839, 5 Bing. N. C. 694.

(*z*) *Farrance v. Elkington*, 1811, 2 Camp. 591.

(*a*) *Gardner v. Ingram*, 1890, 61 L. T. 729.

(*b*) *Doe v. Jackson*, 1779, 1 Dougl. 175.

(*c*) *Roberts v. Hayward*, 1828, 3 C. & P. 432.

notice to quit or that the landlord would insist on double rent was good, since it was simply a threat of the statutory penalty, and was not an offer of a new agreement (*d*). However, it is now settled that the landlord may incorporate with the notice an offer of a new agreement, and the addition of a clause that, if the tenant retained possession of the premises after a specified date, the annual rent would be increased in a specified manner, was held not to invalidate the prior notice to quit (*e*). So an intimation that the tenant will not stop unless a reduction is made in the rent operates as a notice to quit, with an offer to go on at a lower rent (*f*).

(d) BY WHOM NOTICE MAY BE GIVEN.

The notice may in all cases be given by either landlord—*i.e.* the person in whom the legal reversion is vested (*g*)—or tenant. The notion, thrown out by Lord Mansfield, of a tenancy from year to year, in which the lessor binds himself not to give notice to quit, has been long exploded (*h*). A notice given by the reversioner for the time being can be taken advantage of by persons deriving title through him (*i*).

By either party.

A notice to quit, given by the landlord, must be such as the tenant may safely act on at the time of receiving it (*l*); that is, one which is in fact, and which the tenant has reason to believe to be, then binding on the landlord (*m*). A notice to quit given without authority will not be made valid by the subsequent adoption or ratification of the landlord (*l*); save that a notice given by the agent of one joint tenant can be subsequently recognized by the others (*n*). It is not essential to the validity of a notice to quit given

Agents.

(*d*) *Doe v. Jackson*, 1779, 1 Dougl. 175. See *Doe v. Goldwin*, 1841, 2 Q. B. p. 144.

(*e*) *Ahearn v. Bellman*, 1879, 4 Ex. D. 201.

(*f*) *Bury v. Thompson*, 1895, 1 Q. B. 231; aff. 72 L. T. 187.

(*g*) See *Doe v. Baker*, 1818, 8 Taunt. 241.

(*h*) Per Lawrence, J., in *Doe v. Browne*, 1807, 8 East, p. 167.

(*i*) *Doe v. Forwood*, 1842, 3 Q. B. 627. See *Burton v. Dickenson*, 1867, 17 L. T. 264.

(*l*) *Doe v. Goldwin*, 1841, 2 Q. B. 143; *Doe v. Walters*, 1830, 10 B. & C. 626.

(*m*) *Jones v. Phipps*, 1863, L. R. 3 Q. B. p. 572.

(*n*) *Goodtill v. Woodward*, 1820, 3 B. & A. 689.

by a general agent, that his agency should appear on the face of the document (*o*). There is, however, a distinction in this respect between a general agent and one having a special or limited authority (*o*), and, in the case of the latter, it would appear that a notice is bad if it does not state that it is given by authority or in the name of the principal (*p*).

An agent to receive rents and to let has authority to determine tenancies (*q*). The acting steward of a corporation can give notice, although he has not been appointed under seal (*r*). But notice given by an agent of an agent requires the recognition of the principal (*s*).

Real representatives.

In the case of death after 31st December, 1897, real estate devolves upon the personal representatives of the deceased, and while it remains vested in them they are the proper persons to give notice to quit; but save under exceptional circumstances the notice should only be given at the instance of the heir-at-law or devisee (*t*).

Cestui que trust.

Receiver.

A *cestui que trust*, who has been permitted for many years by the trustees to have the entire management of the trust estates (*u*), and a receiver appointed by the Court of Chancery, with a general authority to let lands to tenants from year to year (*v*), are deemed general agents, and may give valid notices to quit in their own names. But a *cestui que trust*, who has not been held out as the agent of the trustees, can neither give nor receive notice (*x*).

Joint tenant.

A notice to quit, signed by one of two joint tenants on behalf of the other, is sufficient to put an end to a tenancy from year to year as to both (*y*).

(*o*) See note (*n*), p. 443.

(*p*) See *Jones v. Phipps*, 1868, L. R. 3 Q. B. 567; *Doe v. Goldwin*, 1841, 2 Q. B. 143.

(*q*) *Doe v. Mizen*, 1837, 2 Moo. & R. 56. See *E. of Erue v. Armstrong*, 1872, Ir. R. 6 C. L. 279.

(*r*) *Roe v. Pierce*, 1809, 2 Camp. 96. See *Doe v. Bold*, 1847, 11 Q. B. 127.

(*s*) *Doe v. Robinson*, 1837, 3 Bing. N. C. 677.

(*t*) *Supra*, p. 62.

(*u*) *Jones v. Phipps*, *supra*.

(*v*) *Wilkinson v. Colley*, 1771, 5 Burr. 2694; *Doe v. Read*, 1810, 12 East, 57.

(*x*) *Easton v. Penney*, 1892, 67 L. T. 290.

(*y*) *Doe v. Summersett*, 1830, 1 B. & Ad. 135; *Doe v. Hughes*, 1840, 7 M. & W. 129, 141; *Alford v. Vickery*, 1842, Car. & M. 280. See *Doe*

(e) TO WHOM NOTICE IS TO BE GIVEN.

A notice to quit proceeding from the landlord must be served upon the original tenant or his assignee (*z*). Since there is no privity of contract between the landlord and an undertenant, the landlord cannot entitle himself to recover against such undertenant by giving a notice to quit in his own name (*z*). Where A., the original tenant, quits possession, and is succeeded by B., it is presumed that B. is the assignee of A., and notice may be served on B. (*a*). Where the tenant from year to year is dead, notice served on his widow is good, unless it is shown that some other person is executor or administrator (*aa*); and it is not invalidated by the subsequent appointment of an administrator (*b*). If notice is to be given to the lessor or his assigns, it must be given to each assign, though the assigns are trustees (*c*).

(f) MODE OF SERVICE OF NOTICE TO QUIT.

It is not necessary that the notice should be directed to the tenant if it can be proved to have been delivered to him in proper time (*d*); and his own references to the receipt of the notice may be relied on for this purpose (*e*). It may be either served upon him personally, or upon his attorney (*f*); or it may be left with his wife (*g*) or servant at his dwelling-house (*h*), but in this case an explanation of the nature of the notice should be given at the time when it is served (*i*). It is not necessary that it should be delivered by the servant to the tenant before the commence-

1. On tenant.

v. Hulme, 1820, 2 M. & Ry. 433; *Doe v. Chaplin*, 1810, 3 Taunt. 120; *Jacobs v. Seward*, 1872, L. R. 5 H. L. 464. As to notice by executors, see *Right v. Cuthell*, 1804, 5 East, 491; by partners, *Doe v. Eliot*, 1828, 2 M. & Ry. 433.

(*z*) *Pleasant v. Benson*, 1811, 14 East, 234.

(*a*) *Doe v. Williams*, 1826, 6 B. & C. 41.

(*aa*) *Rees v. Perrot*, 1830, 4 C. & P. 230.

(*b*) *Sweeney v. Sweeney*, 1876, Ir. R. 10 C. L. 375.

(*c*) *Quartermaine v. Selby*, 1889, 5 T. L. R. 223.

(*d*) *Doe v. Wrightman*, 1801, 4 Esp. 5.

(*e*) *Doe v. Hall*, 1843, 5 M. & Gr. 795.

(*f*) See *Doe v. Ongley*, 1850, 10 C. B. 25.

(*g*) See *Pulteney v. Shelton*, 1799, 5 Ves. 147; *Roe v. Street*, 1834, 2 A. & E. 329; *Smith v. Clark*, 1840, 9 Dowl. 202.

(*h*) *Jones v. Marsh*, 1793, 4 T. R. 464.

(*i*) See *Doe v. Lucas*, 1804, 5 Esp. 153.

ment of the six months (*k*), or indeed at all, provided the servant can be considered as the tenant's agent to receive the notice (*l*).

A notice put under the door of the tenant's house is valid, if it can be proved to have come to the tenant's hands half-a-year before the expiration of the current year of the tenancy (*m*). But where it is provided that the notice shall be delivered to the tenant or his assignees, and the tenant, after having mortgaged the premises by sub-demise, disappears, it seems that no notice can be served. Notices sent to the lessee's last known address, or to the mortgagee, or to the occupier, are all equally ineffectual (*n*).

Joint tenants. The service of a notice upon the demised premises on one of two tenants holding under a joint demise, is presumptive evidence that the notice reached the other (*o*), though it seems that notice to one of two tenants in common or joint tenants is sufficient apart from any such presumption (*p*).

Corporation. Where a corporation is the tenant, the notice to quit may be served on its officers (*q*).

2. On landlord. If the notice proceeds from the tenant, it should be given to his immediate landlord or to the attorney or agent of such landlord authorized to receive such notices, and not to a mere collector of rents (*r*). When a notice is sent by post to the landlord or his agent, it seems that the day on which the letter is delivered will be considered as the time at which the notice is given (*s*). But if the posting is proved, it will be presumed that the letter was delivered in due course of post (*t*). It is sufficient if the notice sent by post can be proved to have reached the office of the

(*k*) *Doe v. Dunbar*, 1826, Moo. & M. 10.

(*l*) *Tanham v. Nicholson*, 1872, L. R. 5 H. L. 561. See *Liddy v. Kennedy*, 1871, L. R. 5 H. L. 134.

(*m*) *Alford v. Vickery*, 1842, Car. & M. 280.

(*n*) *Hogg v. Brooks*, 1885, 15 Q. B. D. 256. See *Seaward v. Drew*, 1898, 67 L. J. Q. B. 322. (*o*) *Doe v. Watkins*, 1806, 7 East, 551.

(*p*) *Doe v. Crick*, 1805, 5 Esp. 196.

(*q*) *Doe v. Woodman*, 1807, 8 East, 228.

(*r*) *Pearse v. Boulter*, 1860, 2 F. & F. 133.

(*s*) See *Reg. v. Slawstone*, 1852, 18 Q. B. 388; *Reg. v. Recorder of Richmond*, 1858, E. B. & E. 253.

(*t*) *Gresham House Estate Co. v. Rossa Gold Mining Co.*, 1870, W. N. p. 119.

person on whom it is served at any time during the last day on which service can be made, although after business hours (*u*).

At the time of service of a notice to quit, a memorandum of the fact of such service should be indorsed upon a duplicate of the notice (*x*). The duplicate can be given in evidence without notice to produce the original (*y*), and the indorsement, if made in the ordinary course of business, is admissible in evidence after the death of the person who made it (*z*), though an oral statement, explaining it and not so made, is not admissible (*a*).

Memorandum of service.

(g) WAIVER OF NOTICE TO QUIT.

If, after the expiration of a notice to quit, the parties by their acts unmistakably acknowledge a subsisting tenancy between them, the notice will be deemed to be waived (*b*). A second notice to quit is considered as such an acknowledgment (*c*), unless, under the circumstances of the case, the person to whom it is given would not understand it as waiving the former notice (*d*).

Second notice to quit.

A landlord may waive a notice to quit by accepting, either personally (*e*), or by an agent specially authorized to receive it (*f*), rent (*c*) due for the occupation of the premises after the expiration of the notice (*g*), though only for a single day (*h*); but such acceptance of rent is only evidence of waiver to go to the jury (*g*). It is no waiver if in fact it is accepted in lieu of double rent under 4 Geo. 2, c. 28, s. 2 (*g*). A receipt for rent, stipulating that the acceptance shall not operate as a waiver, does not require an agreement stamp (*i*).

Acceptance of rent.

(*u*) See *Papillon v. Brunton*, 1860, 5 H. & N. 518, 522.

(*x*) See *Doe v. Turford*, 1832, 3 B. & Ad. 890; *Doe v. Somerton*, 1845, 7 Q. B. 58.

(*y*) *Doe v. Somerton*, *supra*.

(*z*) *Doe v. Turford*, *supra*.

(*a*) *Stapylton v. Clough*, 1853, 2 E. & B. 933.

(*b*) See *Doe v. Palmer*, 1812, 16 East, 53, 56.

(*c*) Per Lord Ellenborough, in *Doe v. Palmer*, 16 East, p. 56.

(*d*) See *Doe v. Humphreys*, 1802, 2 East, p. 240; *Doe v. Steel*, 1811, 3 Camp. p. 117.

(*e*) *Goodright v. Cordwent*, 1795, 6 T. R. 219.

(*f*) See *Doe v. Culvert*, 1810, 2 Camp. 387.

(*g*) See *Doe v. Batten*, 1775, Cowp. 243; *infra*, p. 514.

(*h*) *Keith, Prowse & Co. v. Nat. Telephone Co.*, 1894, 2 Ch. 147.

(*i*) *Doe v. Fuller*, 1835, Tyr. & G. 17.

Distress.

A distress for rent, on the other hand, is an express confirmation of the tenancy, and operates in itself as a waiver of the notice (*k*). A tenant who submits to the distress acknowledges a tenancy (*l*), but till a new tenancy has been created the landlord is not entitled to distrain, and his proper remedy is an action for use and occupation (*m*). But after verdict in ejectment, founded on notice to quit, distress is no waiver of the notice (*n*).

Holding over.

A mere demand of rent, due after the expiration of the notice (*o*), or a holding over or accidental detention of the key by the tenant after that event (*p*), does not necessarily operate as a waiver of the notice. Such matters are evidence of intention for the jury (*o*).

Withdrawal of notice.

When a valid (*q*) notice to quit is given by landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties. If such consent is given, there is a new agreement between the parties, and a new tenancy is created which exists only under that new agreement (*r*); consequently a guarantor of the rent under the original tenancy is not liable for rent which became due after the time when the notice would have expired (*s*). An agreement by the landlord, at the request of the tenant, to suspend the exercise of his rights under the notice to quit, will not operate as a waiver of the notice, or as a licence to the tenant to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary (*t*).

Dispensing with notice.

If at the end of a year, in a tenancy from year to year, the landlord accepts another tenant in the room of the

(*k*) *Zouch v. Willingale*, 1790, 1 H. Bl. 311.

(*l*) *Panton v. Jones*, 1813, 3 Camp. 372.

(*m*) *Alford v. Vickery*, 1842, Car. & M. 280.

(*n*) *Doe v. Darby*, 1818, 8 Taunt. 538.

(*o*) *Blyth v. Dennett*, 1853, 13 C. B. 178.

(*p*) *Jenner v. Clegg*, 1832, 1 Moo. & Rob. 213, 215; *Gray v. Bompas*, 1862, 11 C. B. N. S. 520. See *Jones v. Shears*, 1836, 4 A. & E. 832.

(*q*) See *Doe v. Milward*, 1838, 3 M. & W. 328.

(*r*) But it has been held in Ireland that a notice to quit, which is abandoned during its currency by consent of both parties, does not in itself put an end to a tenancy from year to year: *Inchiquin v. Lyons*, 1887, 20 L. R. Ir. 474.

(*s*) *Tayleur v. Wildin*, 1868, L. R. 3 Ex. 303, 305; *Blyth v. Dennett*, 1853, 13 C. B. 178; *Vance v. Vance*, 1871, Ir. R. 5 C. L. 363. See *Giddens v. Dodd*, 1856, 3 Drew. 485.

(*t*) *Whiteacre v. Symonds*, 1808, 10 East, p. 16.

former, this is equivalent to dispensing with notice to quit (*u*).

Irregularity in the notice may be cured by acquiescence on the part of the party to whom it is given (*x*); though for this purpose a mere agreement after the expiry of the notice to give up the key is not enough (*y*). And the landlord's acquiescence in a short notice does not bind him to accept it if he subsequently insists on full notice (*z*).

Acquiescence in irregularity.

(iii) *By verbal Disclaimer.*

If a tenant from year to year, verbally (*a*) or in writing, unequivocally denies the title of his landlord, and renounces his character of tenant, either by setting up title in another, or by claiming title in himself (*b*), the tenancy may be forthwith determined by the landlord without any notice to quit (*c*). It seems that whether a particular expression does or does not amount to a disclaimer is a question for the decision of a jury (*d*). An omission to acknowledge the landlord as such, by requesting further information, will not be enough; nor will a mere refusal to pay rent. A refusal to deliver possession, or a declaration by the tenant that he will continue to hold possession, at a time when the landlord has no right to claim it, cannot have the effect of a disclaimer (*e*).

What amounts to a disclaimer.

(*u*) *Sparrow v. Hawkes*, 1797, 2 Esp. 505.

(*x*) *Shirley v. Newman*, 1795, 1 Esp. 266.

(*y*) *Brown v. Burtinshaw*, 1826, 7 D. & Ry. 603.

(*z*) *Bessell v. Landsberg*, 1845, 7 Q. B. 638; *Johnstone v. Hudlestone*, 1825, 4 B. & C. 922; *Doe v. Johnston*, 1825, M'C. & Y. 141.

(*a*) *Doe v. Wells*, 1839, 10 A. & E. 427. But a lease for a term cannot be forfeited by mere words, *S. C.*

(*b*) Per Tindal, C.J., in *Doe v. Cooper*, 1840, 1 M. & Gr. p. 139. See *Jones v. Mills*, 1861, 10 C. B. N. S. 788, 796; *Doe v. Cawdor*, 1834, 1 Cr. M. & R. 398; *Hunt v. Allgood*, 1861, 10 C. B. N. S. 253.

(*c*) *Fivian v. Moat*, 1881, 16 C. D. 730; *Throgmorton v. Whelpdale*, 1769, Bull. N. P. 96; *Doe v. Whittick*, 1820, Gow, 195; *Doe v. Pasquali*, 1794, Peake, N. P. C. p. 197; *Doe v. Frowd*, 1828, 4 Bing. 557; *Doe v. Grubb*, 1830, 10 B. & C. 816; *Doe v. Price*, 1832, 9 Bing. 356, 358; *Doe v. Pittman*, 1833, 2 Nev. & M. 673; *Doe v. Rollings*, 1847, 4 C. B. 188; *Doe v. Evans*, 1841, 9 M. & W. 48; *Doe v. Gower*, 1851, 17 Q. B. 589.

(*d*) See *Doe v. Long*, 1841, 9 C. & P. 773.

(*e*) See judgment in *Doe v. Stanion*, 1836, 1 M. & W. p. 703.

(4) DETERMINATION OF TENANCIES FOR TERMS OF YEARS.

Where the demise is for a term certain, no notice to quit is required at the end of the term (*f*), and so where the lease is to determine on a certain event (*g*). If under an agreement for a tenancy of buildings for a term the landlord is to do repairs, there is no implied condition that the tenant may quit if the repairs are not done (*h*). Where there is a lease by a partner to himself and his co-partners for the use of the firm, the lessor can recover possession upon a dissolution without notice to the other partners to quit (*i*).

Tenancies for optional terms. By whom option may be exercised.

If a lease is made determinable at certain specified periods, and nothing is said as to the person by whom the option is to be exercised, the lessee only can exercise it (*k*), and specific performance of an agreement for a lease with such an option will be decreed, although the lessor understood that he was to have the option as well (*l*). If the lessee has assigned, it is for the assignee for the time being to exercise the option, and, if he has disappeared, neither the lessee nor a previous assign can determine the lease, notwithstanding that they are liable to pay the rent (*m*). If the option is in a lease under seal, an abandonment of it is not effectual unless also under seal (*n*).

But a lease which is made determinable "if the parties think fit," is determinable only by consent of both parties (*o*). A proviso whereby the option to determine a lease is given

(*f*) *Cobb v. Stokes*, 1807, 8 East, 358. A term of years lasts during the whole anniversary of the day from which it is granted. Hence a lease for twenty-one years from 25th March, 1809, did not expire till the end of 25th March, 1830; *Ackland v. Lutley*, 1839, 9 A. & E. 879. See *Cutting v. Derby*, 1776, 2 W. Bl. 1075. And as to an agreement under which part of the premises are to be retained for a further period, see *Doe v. Houghton*, 1827, 1 Man. & Ry. 208.

(*g*) *Right v. Darby*, 1786, 1 T. R. 159, per Lord Mansfield, C.J., p. 162.

(*h*) *Surplice v. Farnsworth*, 1844, 7 M. & Gr. 576.

(*i*) *Doe v. Bluck*, 1838, 8 C. & P. 464; *Doe v. Miles*, 1816, 1 Stark. 181.

(*k*) *Price v. Dyer*, 1810, 17 Ves. at p. 363; *Dann v. Spurrier*, 1803, 3 B. & P. 399, overruling *Goodright v. Richardson*, 1789, 3 T. R. 462; 7 Ves. 231; *Doe v. Dixon*, 1807, 9 East, 15.

(*l*) *Powell v. Smith*, 1872, 14 Eq. 85.

(*m*) *Seaward v. Drew*, 1898, 67 L. J. Q. B. 322.

(*n*) *Goodright v. Mark*, 1815, 4 M. & S. 30.

(*o*) *Fowell v. Tranter*, 1864, 3 H. & C. 458.

to either of the parties, his executors or administrators, extends to the devisee of the lessor, who is entitled to the rent and reversion (*p*). Where the proviso requires notice to be given in writing of the intention to exercise the option to determine the lease, such notice will be good though given in the form of a notice to quit (*q*), but it may not be by parol (*r*).

The notice will be invalid if it varies from the terms of the proviso as to the time at which the option is to be exercised (*s*). The period for which notice may be given is to be reckoned from the date for the commencement of the term, and not from the date of the lease (*t*).

A condition depending on the lease being determined, and the lessee "leaving" the house, is satisfied although the lessee continues after the determination of the lease to reside in the house with a new lessee (*u*).

(5) DETERMINATION OF TENANCIES FOR LIFE.

By the Cestui que Vie Act, 1707 (*x*), s. 1, provision is made for the production of a *cestui que vie* at the instance of the remainderman, and in default of production the remainderman may enter as though the *cestui que vie* were dead (*y*). The tenant for life may re-enter if the *cestui que vie* is afterwards

(*p*) *Roe v. Hayley*, 1810, 12 East, 464

(*q*) *Giddens v. Dodd*, 1856, 3 Drew. 485. Notice may be given by the lessee in the following form :—

To Mr. E. F.

I hereby give you notice that I am desirous of putting an end to the term granted by an indenture of lease dated the — day of —, 18—, and made between [yourself] of the one part and [myself] of the other part, at the end of the first [seven] years of the said term, in pursuance of a proviso contained in the said lease. Dated the — day of —, 18—.

C. D.

For a case of a power for heirs, executors, &c., of either party dying within the term to give notice, see *Legg v. Benion*, 1737, Willes, 43. As to notice to determine a lease made by the Commissioners of Woods and Forests, see *Coombes v. Dutton*, 1839, 5 M. & W. 469.

(*r*) *Legg v. Benion*, 1737, Willes, 43.

(*s*) See *Cudby v. Martinez*, 1840, 11 A. & E. 720.

(*t*) *Bird v. Baker*, 1858, 1 E. & E. 12.

(*u*) *Lucas v. Rideout*, 1868, L. R. 3 H. L. 153.

(*x*) 6 Anne, c. 72. See also 18 & 19 Car. 2, c. 11.

(*y*) See 6 Anne, c. 72, s. 2, as to the mode of procedure when the *cestui que vie* is beyond seas.

proved to be alive (z). The Court cannot order the remainderman to pay to the tenant *pur autre vie* the costs of producing the *cestui que vie* (a).

SECT. II.—MODES OF DETERMINATION GENERALLY APPLICABLE.

(1) MERGER.

When merger occurs.

Merger occurs where a greater and a less estate coincide and meet in one and the same person, without any intermediate estate (b); as, for instance, when tenant for years obtains the fee (c). The doctrine of merger is illustrated in the judgment of the King's Bench delivered by Bayley, J., in *Doe v. Walker* (d), with reference to the case of a term of years and an estate *pur autre vie*. If, it was said, a tenant for years acquires a life interest in the estate *pur autre vie*, the two being concurrent, one only can exist, and the other is merged; but there is no inconsistency or incompatibility in a man's having, not two concurrent, but two *successive* estates. If a lease for years be granted to a tenant *pur autre vie*, to commence when his life estate ceases, he will be tenant of the freehold, so long as *cestui que vie* lives, but amenable to the reversioner for every duty to which that tenancy is subject; and he will be tenant for the term when *cestui que vie* dies, and still amenable to the reversioner for all the duties of that tenancy. He will never stand in the character, which the law of merger is calculated to prevent, of reversioner to himself. And there is no merger where a lessee grants to his sublessee the residue of his interest from the termination of the sublease (e). This is a grant of an *interesse termini*, which is only a right, not an estate, and which will neither cause nor prevent a merger (e).

Where two terms of years, one in possession and the other in reversion, meet in the same person, so that a merger takes place, it is the estate in reversion that

(z) 6 Anne, c. 72, s. 3.

(a) *Re Isaac*, 1838, 4 M. & Cr. 11.

(b) See *Burton v. Barclay*, 1831, 7 Bing. 745, 756.

(c) 2 Black. Com. 177.

(d) 1826, 5 B. & C. p. 121.

(e) *Hyde v. Warden*, 1877, 3 Ex. D. 72, 84.

survives, although it is for a shorter term (*f*). Thus a term for one thousand years can be merged in a reversionary term for five hundred years (*g*).

It is now provided that there shall not be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity (*h*). In equity the question of merger is governed by the intention, actual or presumed, of the person in whom the interests are united (*i*); and there is no merger where the interests are taken in different rights (*k*). Thus where C., an administrator, granted an underlease, and the underlessee assigned to C. for the residue of the term, it was held that there was no merger (*l*). Merger is sometimes provided against by taking a conveyance of one estate to a trustee (*m*); but, if the intention is clearly expressed, this device is needless. In the absence, however, of any intention to keep the term alive, it will merge in the reversion, and the covenants attached to it will be extinguished (*n*).

No merger unless in equity.

Formerly, where the reversion upon a sublease was merged in the fee, the covenants in the sublease were destroyed (*o*); but now it is enacted (*p*) that when the reversion expectant on a lease shall merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the hereditaments shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the merger thereof would have subsisted, be deemed the reversion expectant on the same lease (*q*).

Effect on subleases.

Although a lease is merged by the purchase of the

(*f*) Bac. Abr. (S. 1 (2)), 876.

(*g*) *Stephens v. Bridges*, 1821, 6 Madd. 66.

(*h*) Judicature Act, 1873, s. 25 (4).

(*i*) *Forbes v. Moffatt*, 1811, 18 Ves. p. 390, per Grant, M.R. See *Snov v. Boycott*, 1892, 3 Ch. 110.

(*k*) *Chambers v. Kingham*, 1878, 10 C. D. 743; and apparently not at law, at any rate if the union of the interests is not due to the act of the party: *Platt v. Sleep*, 1612, Cro. Jac. 275; *Jones v. Davies*, 1860, 5 H. & N. 766; 7 H. & N. 507.

(*l*) *Chambers v. Kingham*, 1878, 10 C. D. 743.

(*m*) See *Belaney v. Belaney*, 1867, 2 Ch. 138.

(*n*) See *Dynévor v. Tennant*, 1888, 13 A. C. 279.

(*o*) *Webb v. Russell*, 1789, 3 T. R. 393.

(*p*) The Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 9; *infra*, p. 461.

(*q*) See, too, Conv. Act, 1881, s. 10.

reversion, the owner may be bound in equity to observe the building covenants attached to it (*r*).

(2) SURRENDER.

Express.

Surrender,
how made.

To constitute a valid express surrender, it is essential that it should be made to and accepted by the owner of the immediate estate in reversion or remainder (*s*).

Any form of words whereby such an intent and agreement of the parties may appear will be sufficient to work a surrender; and the law will direct the operation and construction of the words accordingly, without the precise or formal mention of the word *surrender* (*t*). Lessee for years may surrender to a leasehold reversioner, although his term exceeds in length that of the reversioner (*u*). Where the lessor had assigned the reversion under an agreement by which he was still to receive the rent, it was held that the lessee might surrender to the assignee and so stop the rent, notwithstanding that he had had notice of the agreement (*x*).

Parol sur-
render void.

Parol surrenders are void (*y*). To be effectual every express surrender must be either by deed or at least in writing, and, unless the interest surrendered might have been created by parol, the surrender must be by deed. This is the result of the two following enactments:—

Statute of
Frauds (*z*),
s. 3.

Leases to be
surrendered
by writing.

No leases, estates or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, in any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act or operation of law.

(*r*) *Birmingham Joint Stock Co. v. Leu*, 1877, 36 L. T. 843. See *Craig v. Greer*, 1899, 1 I. R. 258.

(*s*) See Bac. Abr. (S. 1) 873; *Cudde v. Moody*, 1861, 30 L. J. Ex. 385.

(*t*) Bac. Abr. (S. 1) 873. See *Smith v. Mapleback*, 1786, 1 T. R. 441; *Doe v. Stagg*, 1839, 5 Bing. N. C. 564. The stamp duty on a surrender, not chargeable with duty as a conveyance on sale or mortgage, is ten shillings. (Stat. 54 & 55 Vict. c. 39, Schedule.)

(*u*) *Hughes v. Robotham*, 1593, Cro. Eliz. 302.

(*x*) *Southwell v. Scotter*, 1880, 49 L. J. Q. B. 356.

(*y*) See *Matthews v. Swell*, 1818, 8 Taunt. 270. (*z*) 29 Car. 2, c. 3.

And by the Real Property Act, 1845, a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, is void at law, unless made by deed (*a*). Stat. 8 & 9
Vict. c. 106,
s. 3.
Surrenders to
be by deed,
except as to
parol
tenancies.

It follows that a parol agreement for the determination of a tenancy is not binding (*b*), even though the tenancy has been created by parol (*c*). The recital in a second lease of the surrender of the first is not equivalent to a surrender by deed or note in writing (*d*).

Where a lease has been expressly surrendered, and a voidable lease taken in its place, it does not revive upon the new lease being avoided (*e*).

Implied.

A surrender (*f*) will be implied (1) from delivery of possession by the lessee to the lessor; (2) acceptance of a new lease by the lessee; (3) grant of a new lease by the lessor to a third person with the consent of the lessee who gives up possession; and (4) the creation of a new relation between the parties inconsistent with that of landlord and tenant.

A surrender may be implied by operation of law from anything which amounts to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession of the premises (*g*). An agreement to quit, if conditional, and if the condition is not performed, does not operate as a surrender (*h*); nor does an agreement to give up the premises in the future (*i*). 1. Delivery of
possession.

The following circumstances have been held to amount to a surrender by operation of law:—Delivery by the tenant to the landlord, and acceptance by the landlord of the keys

(*a*) Formerly a lease for years might be surrendered by writing not under seal: *Farmer v. Rogers*, 1755, 2 Wils. 26.

(*b*) *Thomson v. Wilson*, 1818, 2 Stark. 379.

(*c*) *Mollett v. Brayne*, 1809, 2 Camp. 103.

(*d*) *Roe v. Archb. of York*, 1805, 6 East, 86.

(*e*) *Doe v. Bridges*, 1831, 1 B. & Ad. 847.

(*f*) See article in 37 Solicitors' Journal, 539.

(*g*) Per Erle, C.J., in *Phenè v. Popplewell*, 1862, 12 C. B. N. S. p. 340.

(*h*) *Coupland v. Maynard*, 1810, 12 East, 134.

(*i*) *Doe v. Milward*, 1838, 3 M. & W. 328. See *Weddell v. Capes*, 1836, 1 M. & W. 50.

of the demised house, with the intention that there shall be a transfer of possession (*k*). In this case, however, there must be clear evidence of the acceptance of the key by the landlord (*l*). The mere fact that he has not sent back the key which the tenant has left at his office is not evidence from which a surrender can be implied (*l*); and if he tries to return the key, his entry for the purpose of repairing and re-letting the premises is not such an acceptance of possession as to complete the surrender (*m*). Even if he keeps the keys, his attempt to get a new tenant (*n*), or the casual occupation of part of the premises, is not sufficient (*o*); but it is otherwise if he sets about repairs in such a way as implies that he regards the house as in his own occupation (*p*). An agreement for giving up the premises may be a surrender, notwithstanding that the tenant is allowed to hold over part without rent (*q*); though where part is kept at a reduced rent this is not necessarily a surrender and a new tenancy (*r*).

A parol licence to quit will not of itself operate as a surrender of the tenant's interest; but when the tenant gives up possession in pursuance of such a licence, and the landlord accepts possession, the licence, coupled with the fact of the change of possession, is a surrender by act and operation of law, and the landlord cannot recover any rent which becomes due after his acceptance of the possession (*s*). If, after the tenant has quitted, the landlord lets to another tenant who occupies, this is a rescission of the first contract of tenancy, and dispenses with a written surrender (*t*).

2. Acceptance
of new lease.

A surrender by operation of law takes place in cases where the owner of a particular estate has been a party

(*k*) *Dodd v. Acklom*, 1843, 6 M. & Gr. 672; *Phenè v. Popplewell*, 1862, 12 C. B. N. S. 334. See *Whitehead v. Clifford*, 1814, 5 Taunt. 518; *Grimman v. Legge*, 1828, 8 B. & C. 324.

(*l*) *Cunnam v. Hartley*, 1850, 9 C. B. 634. See *Brown v. Burtinshaw*, 1826, 7 D. & Ry. 603; *Furnivall v. Grove*, 1860, 8 C. B. N. S. 496.

(*m*) *Smith v. Blackmore*, 1885, 1 T. L. R. 267.

(*n*) *Oustler v. Henderson*, 1877, 2 Q. B. D. 575; *Redpath v. Roberts*, 1801, 3 Esp. 225.

(*o*) *Oustler v. Henderson*, *supra*.

(*p*) *Smith v. Roberts*, 1892, 9 T. L. R. 77.

(*q*) *Williams v. Sawyer*, 1821, 3 Br. & B. 70.

(*r*) *Holme v. Brunskill*, 1877, 3 Q. B. D. 495.

(*s*) Per Bayley, J., in *Grimman v. Legge*, 1828, 8 B. & C. p. 325.

(*t*) *Walls v. Atcheson*, 1826, 3 Bing. 462.

to some act the validity of which he is by law afterwards estopped from disputing, and which would not have been valid had his particular estate continued to exist. Hence the acceptance by a lessee for years of a new lease from his lessor to commence during the currency of the first lease operates, even though it be a future lease (*u*), as an immediate surrender, the lessee being estopped from saying that the lessor had not power to grant the new lease (*x*). The surrender in this case is the act of the law, and will prevail in spite of the intention of the parties (*y*). A new lease will operate as a surrender, although for a shorter term than the prior lease; and a new valid lease by parol will constitute a surrender of a prior lease by deed (*z*). But where the new lease does not pass an interest according to the contract, the acceptance of it will not amount to a surrender of the former lease (*u*). Hence, the acceptance of a void lease (*a*), or it seems a voidable lease (*b*), or the execution of a mere agreement for a new lease (*c*), will not operate as a surrender. But an agreement for a new lease at an increased rent, which is acted upon, is a surrender of the old lease (*d*), and it is the same probably now with any agreement which is capable of being specifically enforced, and is consequently equivalent to a lease (*e*).

Whether an agreement operates as a demise, or as an agreement only, depends on the intention of the parties (*f*). An agreement for giving up part of the premises and paying a diminished rent (*g*), or, where the parties believe the tenancy

(*u*) *Ire's Case*, 1597, 5 Rep. 11 a.

(*x*) *Lyon v. Reed*, 1844, 13 M. & W. 285, per Parke, B., at p. 306. See judgment of Tindal, C.J., in *Dodd v. Acklom*, 1843, 6 M. & Gr. 679; *Fulmerstone v. Stecard*, 1554, Plowd. 106, 107 a; *Ire v. Sams*, 1597, Cro. Eliz. at p. 522; *Darison v. Stanley*, 1768, 4 Burr. 2210; *McDonnell v. Pope*, 1852, 9 Hare, 705.

(*y*) *Lyon v. Reed*, *supra*.

(*z*) *Dodd v. Acklom*, *supra*.

(*a*) See *Doe v. Courtenay*, 1848, 11 Q. B. 702; *Doe v. Poole*, 1848, 11 Q. B. 713; *Zouch v. Parsons*, 1765, 3 Burr. 1807.

(*b*) *Easton v. Penny*, 1892, 67 L. T. 290. Though see *Roe v. Archb. of York*, 1805, 6 East, 86.

(*c*) *Foquet v. Moor*, 1852, 7 Ex. 870. See *Graham v. Whichelo*, 1832, 1 Cr. & M. 188; judgment of Holroyd, J., in *Hamerton v. Stead*, 1824, 3 B. & C. p. 482. Cf. *Porry v. Allen*, 1590, Cro. Eliz. 173.

(*d*) *Ex parte Vitale*, 1883, 47 L. T. 480.

(*e*) See *Walsh v. Lonsdale*, 1882, 21 C. D. 9; *supra*, p. 81.

(*f*) *Sidebotham v. Holland*, 1895, 1 Q. B. 378, 385.

(*g*) *Jones v. Bridgman*, 1878, 39 L. T. 500. Cf. *supra*, p. 456, note (*r*).

to have come to an end, for reduction of rent only (*h*), may be equivalent to a new demise, and so operate as a surrender; but this result does not follow from a mere abatement (*i*), or agreement for the reduction of rent made during the continuance of the tenancy (*j*); or from an agreement for the increase of rent (*k*), where the extra sum agreed upon would not bind an assignee of the lease (*la*).

An attornment by the lessee to the sequestrators of the lessor is not necessarily a surrender of the lease (*n*). An acceptance of a new lease for part of the demised premises is a surrender only of that part (*o*).

3. Grant by landlord of new lease to third person, with assent of prior tenant who gives up possession.

The grant of a new lease, by the landlord, to a third person, with the assent of the tenant, who gives up his own possession to the new lessee (*p*); or the acceptance by the landlord, with the assent of a tenant from year to year (*q*) or for a term (*r*), of another person as tenant, who takes possession (*s*), operates as a surrender by operation of law. The essential element is the change of possession. The grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, does not operate as a surrender in law of such prior lease (*t*). It is further necessary that the old tenant should give up possession to the new tenant at or about the time of the grant of the new lease (*u*). There is no surrender upon negotiations for a lease to a third person, if the grant

(*h*) *Holpes v. Lammie*, 1834, 18 J. P. 347.

(*i*) *Clarke v. Moore*, 1841, 1 Jol. & Lat. 727, p. 728.

(*j*) *Cooley v. Fane*, 1832, 7 Ex. 318.

(*k*) *Indalwood v. Lynn*, 1897, 39 L. R. Ir. 474; *Gaskie v. Monk*, 1844, 10 L. & E. 307. See *Dee v. Goeke*, 1844, 5 Q. B. 541.

(*la*) *Dunlop v. Bond*, 1832, 3 B. & Ad. 389.

(*n*) *Cornish v. Seabell*, 1828, 3 B. & C. 471.

(*o*) *E. of Cornwall v. Fiddow*, 1844, 13 M. & W. 313, 342; *Fish v. Langford*, 1861, 3 Ecl. Abt. 291.

(*p*) *Dunlop v. Bond*, 1832, 1 H. & N. 744; *McDonnell v. Pope*, 1832, 3 Hare, 764. See *Baz v. Bondary*, 1834, 1 A. & E. 136; *Nicholls v. Ashbourne*, 1847, 10 Q. B. 641; *Reese v. Bond*, 1834, 1 Cr. M. & R. 31.

(*q*) *Thomas v. Cook*, 1818, 3 B. & A. 119; *Stone v. Whiting*, 1817, 3 Stark. 235.

(*r*) *Reese v. Bond*, 1834, 1 Cr. M. & R. 31.

(*s*) *Ingler v. Claydon*, 1765, Peake Add. Cas. 19.

(*t*) *Thomas v. Cook*, which was at one time thought to countenance the opposite view, may be explained by change of possession; see *Lynn v. Bond*, 1844, 13 M. & W. 345, 369; *Cornish v. Bond*, 1845, 3 Jol. & Lat. p. 100. *Wallace v. Richardson*, 1837, 5 M. & W. 402, so far as it adopted the doctrine that change of possession was not necessary, is overruled.

(*u*) *Wallace v. Hurd*, 1832, 2 Ch. 75; *Dee v. Johnston*, 1855, M. & C. 141.

of the new lease is ultimately refused (*x*): but a surrender may be implied from an agreement for a lease to the old and a new tenant jointly under which the tenants occupy (*y*). An exchange between two tenants holding under different landlords, the exchange being with the assent of the landlords, operates as a surrender and the creation of a new tenancy as to each holding (*z*).

The acceptance of a new tenant is a question of fact for the jury (*a*), and it is not sufficient, where executors are the landlords, to prove acceptance by one executor only (*b*).

Where an undertenant is in possession, the acceptance of such undertenant as tenant by the lessor may be proved by his having accepted the key from the original lessee, or by his acceptance of rent from the undertenant, or by some act tantamount to it (*c*). Receipts for rent received by a landlord from a third person have been said to be strong evidence of a change of tenancy with the consent of the landlord, amounting to a surrender by operation of law (*d*): but they are equally consistent with such third person being an assignee of the lease (*e*). Where the widow of the tenant pays rent to the landlord, this does not, in the absence of assent by his personal representative, operate as a surrender (*f*).

The creation of a new relation in regard to the demised property, wholly inconsistent with that of landlord and tenant (*g*), operates as a surrender: as, for instance, where the tenant becomes the servant or caretaker of the landlord, accounting to him for all the profits of the demised premises, and being allowed fixed daily wages (*h*). A contract of purchase by the tenant is not in itself a surrender of the lease, since the contract implies a condition of good title (*i*). A redemise by the lessee to the lessor for the whole term with

4. Creation of inconsistent relation.

- (*x*) *Imeson v. Lamb*, 1852, 3 C. & K. 269.
- (*y*) *Hamerton v. Stead*, 1824, 3 B. & C. 478.
- (*z*) *Bees v. Williams*, 1835, 2 Cr. M. & R. 581.
- (*a*) *Woodcock v. Nuth*, 1832, 8 Bing. 170.
- (*b*) *Turner v. Hardey*, 1842, 9 M. & W. 770.
- (*c*) Per Lord Kenyon, C.J., in *Harding v. Crethorn*, 1793, 1 Esp. 57.
- (*d*) *Laurance v. Faux*, 1861, 2 F. & F. 435.
- (*e*) *Copeland v. Warrs*, 1815, 1 Stark. 96.
- (*f*) *Doe v. Wood*, 1845, 14 M. & W. 682.
- (*g*) *Peter v. Kendal*, 1827, 6 B. & C. 703, 710; *Lambert v. McIlhennell*, 1864, 15 Ir. C. L. R. 138.
- (*h*) *Doe v. Stanion*, 1836, 1 M. & W. 695; *Tate v. Darby*, 1846, 15 M. & W. 601, 606.

a reservation of rent works a surrender (*i*), and the rent is only recoverable as a sum in gross (*k*).

Cancelling of
lease.

The mere cancelling of a lease is not a surrender by operation of law of the term thereby granted (*l*), or *primâ facie* evidence of a surrender by deed or in writing (*m*). The cancelling does not destroy the estate vested in the lessee, and the lessor can still sue for recovery of rent (*n*).

Rent after Surrender.

No rent accrues due after the surrender of a lease (*o*), though, if the lease is by deed, and contains a covenant for payment, the lessor remains a specialty creditor for rent accrued due before the surrender (*p*). Where the demise was by parol, he can recover such accrued rent in an action for use and occupation under 11 Geo. 2, c. 19, s. 14 (*q*).

Whether there is a surrender or no, the tenant can excuse himself from payment of rent by showing a contract by the landlord to abandon the rent if the tenant gave up possession (*r*).

Operation of Surrender.

On rights of
third persons.

Though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons who, at the time of the surrender, had rights which such extinguishment would destroy. As to them the surrender operates only as a grant subject to their right, and the interest surrendered still continues so far as is necessary for the preservation of their right (*s*). In this respect a surrender differs from a forfeiture, and the rights of underlessees are preserved,

(*i*) *Lloyd v. Langford*, 1777, 2 Mod. 174; *Smith v. Mapleback*, 1786, 1 T. R. 441. See *Doe v. Ridout*, 1814, 5 Taunt. 519.

(*k*) *Smith v. Mapleback*, *supra*.

(*l*) *Roe v. Archbishop of York*, 1805, 6 East, 86; *Wootley v. Gregory*, 1828, 2 Y. & J. 536. (*m*) *Doe v. Thomas*, 1829, 9 B. & C. 288.

(*n*) *Ward v. Lumley*, 1860, 5 H. & N. 87.

(*o*) *Southwell v. Scotter*, 1880, 49 L. J. Q. B. 356.

(*p*) *Att.-Gen. v. Cor*, 1850, 3 H. L. C. 240.

(*q*) The Distress for Rent Act, 1737; see *Shaw v. Lomas*, 1888, 59 L. T. 477; *supra*, p. 305.

(*r*) *Gore v. Wright*, 1838, 8 A. & E. 118. See *Smith v. Lovell*, 1850, 10 C. B. 6, p. 22.

(*s*) Co. Litt. 338 b; *Doe v. Pyke*, 1816, 5 M. & S. p. 154; *Pleasant v. Benson*, 1811, 4 East, 234, 238. See *Mellor v. Watkins*, 1874, L. R. 9 Q. B. 400; *Pike v. Eyre*, 1829, 9 B. & C. 909, 914.

although at the time of the surrender the term was liable to forfeiture (*t*). So a mortgagee of tenant's fixtures can enter and remove them notwithstanding the surrender (*u*), provided he does so within a reasonable time (*x*); and so can a purchaser of fixtures from a trustee in bankruptcy who surrenders the lease (*y*). But the assignee of future crops takes them subject to the landlord's rent and to the expenses of cultivation subsequent to the surrender (*z*).

Building covenants affecting the demised premises may be enforceable in equity notwithstanding that at law they have been extinguished by a surrender (*a*). But it has been said not to be clear that the doctrine that the rights of third parties cannot be prejudiced by a surrender applies to rights acquired under a covenant or re-grant taken in the lease for the benefit of the lessor (*b*).

It is now provided by the Real Property Act, 1845, that the surrender of a lease places the lessor in the position of immediate lessor to the underlessees:—

Surrender not to affect underlessees.

When the reversion expectant on a lease shall be surrendered or merge, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

Stat. 8 & 9 Vict. c. 106, s. 9.

When reversion on a lease is surrendered or merged, the next vested estate to be deemed the reversion.

Surrender and Renewal.

By 4 Geo. 2, c. 28 (*bb*), s. 6, where a lease is duly surrendered in order to be renewed and a new lease granted, the new lease is as valid as if all the underleases had been likewise surrendered; and the respective rights and liabilities of the new lessee and the underlessees are regulated as though the original lease had been still continued; and the

(*t*) *G. W. Ry. v. Smith*, 1875, 2 C. D. 235. See 3 App. Cas. 165.

(*u*) *London and Westm. Loan Co. v. Drake*, 1859, 6 C. B. N. S. 798.

(*x*) *Moss v. James*, 1878, 38 L. T. 595.

(*y*) *Saint v. Pilley*, 1875, L. R. 10 Ex. 137.

(*z*) *Clements v. Matthews*, 1883, 11 Q. B. D. 808.

(*a*) *Piggott v. Stratton*, 1859, 1 D. F. & J. 33. See *supra*, p. 454, note (*r*).

(*b*) *Dynevor v. Tennant*, 1888, 13 App. Cas. 279. See judgment of Lord Herschell at p. 292. (*bb*) The Landlord and Tenant Act, 1730.

landlord has the same remedy by distress or entry upon the premises in the underleases for the rents reserved by the new lease (not exceeding the rents reserved by the old lease) as if the old lease had been continued. The intention of the Legislature in framing this enactment was to place all parties, as to every matter, in the same position as if no surrender had taken place (*c*); and the new lease passes an immediate estate and not an *interesse termini* only (*d*).

(3) FORFEITURE.

A lease may be forfeited (i) upon the happening of an event which entitles the lessor at once to treat the lease as determined, although there is no express proviso for re-entry; or (ii) under an express proviso for re-entry attached to a breach of a stipulation in the lease.

(i) *Where there is no Express Proviso for Re-entry.*

Disclaimer of
landlord's
title.

Any act of the lessee by which he disaffirms or impugns the title of his lessor occasions a forfeiture of his lease; for to every lease the law tacitly annexes a condition, that if the lessee do anything that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter (*f*). A lessee may thus incur a forfeiture where he sues out a writ, or resorts to a remedy, which claims or supposes a right to the freehold (*f*), or where, in an action by his lessor grounded upon the lease, he resists the demand under the grant of a higher interest in the land (*f*); or where he acknowledges the fee to be in a stranger (*f*); or, in fraud of the lessor, delivers the premises to a stranger claiming under a hostile title, with the intent of enabling him to set up such title (*g*). The mere payment of rent by a tenant *for a term of years* to a third person (*h*), or a verbal denial by such tenant of the landlord's title (*i*), will not operate as a forfeiture of the lease.

(*c*) *Doe v. Marchetti*, 1831, 1 B. & Ad. 715; per Lord Tenterden, C.J., at p. 721. See *Cousins v. Phillips*, 1865, 3 H. & C. 892, 901.

(*d*) *Ecc. Comm. v. Tremer*, 1893, 1 Ch. 166.

(*f*) Bac. Abr. (T. 2) 884.

(*g*) *Doe v. Flynn*, 1834, 1 Cr. M. & R. 137. See *Ackland v. Lutley*, 1839, 9 A. & E. 879.

(*h*) *Doe v. Parker*, 1820, Gow, 180.

(*i*) *Doe v. Wells*, 1839, 10 A. & E. 427.

Forfeitures are also incurred by the breach of express or conventional conditions annexed by the lessor to his grant; for the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal or repugnant to the grant itself, and upon a breach of those conditions may avoid the lease (*l*). On breach of conditions annexed to grant.

In a lease for years, no precise form of words is necessary to make a condition; it is sufficient if it appear that the words used were intended to have that effect (*m*); hence a clause in a lease whereby it is stipulated and conditioned that the lessee shall not assign, creates a condition for the breach of which the lessor may maintain an ejectment (*n*). But if the words amount only to an agreement on the part of the lessee that he will not assign, the lessor cannot determine the lease except under an express proviso for re-entry on breach of the stipulation (*o*). So an agreement by the lessee to give up part of the land on requisition of the lessor, without any clause of re-entry, is a contract, and not a condition (*p*).

A clause of forfeiture, it is said, is construed strictly (*q*). Hence, where it applies in case no sufficient distress is found on the premises, there is no forfeiture unless every part of the premises is searched (*r*). And a forfeiture on assignment without licence, or on charging, is not incurred if the assignment (*s*) or charge (*t*) turns out to be void. Under a condition against assignment an equitable charge on the lease without change of possession is no forfeiture (*u*). But though it is a question of forfeiture, the covenant must be construed fairly; its meaning must be ascertained without regard to forfeiture; and it must be seen whether, upon that ascertained meaning, a forfeiture has been incurred (*x*). Construction of forfeiture clause.

(*l*) Bac. Abr. (T. 2) 885. (*m*) *Doe v. Watt*, 1828, 8 B. & C. p. 315.

(*n*) *Doe v. Watt*, 8 B. & C. 308. See *Simpson v. Titterell*, 1590, Cro. Eliz. 242; *Pembroke v. Berkeley*, 1595, *ib.* 384; *Harrington v. Wise*, 1596, *ib.* 486; Co. Litt. 203 b.

(*o*) *Shaw v. Coffin*, 1863, 14 C. B. N. S. 372.

(*p*) *Doe v. Phillips*, 1824, 2 Bing. 13.

(*q*) *Doe v. Powell*, 1826, 5 B. & C. 308, p. 313.

(*r*) *Rees v. King*, 1800, Forr. 19.

(*t*) *Denn v. Dolman*, 1794, 5 T. R. 641.

(*u*) *Bowser v. Colby*, 1841, 1 Hare, 109, p. 138.

(*x*) *Corp. of Bristol v. Westcott*, 1879, 12 C. D. 461; per Cotton, L.J., at p. 467.

Effect on
underlessees.

Upon forfeiture of a lease the underlessee loses his estate as well as the lessee himself (*y*) ; and the underlessee of part of the premises will forfeit his estate for breach of a covenant relating to the other part (*yy*).

Enforcing
forfeiture.

After a grant of the reversion neither the lessor nor the assignee can take advantage of a forfeiture incurred before the grant (*z*) ; nor can the lessor enforce the forfeiture against a purchaser of the lease whom he has advised, after the cause of forfeiture, to purchase ; unless under special circumstances, as where the purchaser was already interested in the lease as incumbrancer, and the lessor's advice was simply that he should " take to " the premises (*a*).

(ii) *Where there is an Express Proviso for Re-entry.*

By whom
lease may be
determined
under proviso
for re-entry.

The construction of a proviso for re-entry by the lessor on non-performance by the lessee of the covenants of the lease, and that upon such non-performance the term shall cease and become void, is that the lease shall be voidable (*b*), and voidable only at the option of the lessor ; for the lessee who has been guilty of a wrongful act cannot avail himself of that wrongful act to insist that thereby the lease has become void to all intents and purposes (*c*), and the tenancy will therefore continue until some act is done by the lessor showing his intention to determine it (*d*). And it is the same where the condition is incorporated in favour of the Crown by statute (*e*).

Forfeiture
under
proviso.

A proviso for re-entry in case of breach or non-performance of covenants or stipulations applies to a provision

(*y*) *G. W. Ry. v. Smith*, 1876, 2 C. D. p. 253.

(*yy*) *Darlington v. Hamilton*, 1854, Kay, 550 ; *Creswell v. Davidson*, 1887, 56 L. T. 811.

(*z*) *Fenn v. Smart*, 1810, 12 East, 444.

(*a*) *Doe v. Eykins*, 1824, 1 C. & P. 154.

(*b*) *Bowser v. Colby*, 1841, 1 Hare, 109.

(*c*) Judgment of Bayley, J., in *Doe v. Buncks*, 1821, 4 B. & A. p. 406 ; *Reid v. Parsons*, 1817, 2 Chit. 247 ; *Rede v. Furr*, 1817, 6 M. & S. 121 ; *Arnsby v. Woodward*, 1827, 6 B. & C. 519 ; *Dakin v. Cope*, 1827, 2 Russ. 170 ; *Doe v. Birch*, 1836, 1 M. & W. 402 ; *Jones v. Carter*, 1846, 15 M. & W. p. 725 ; *Toleman v. Portbury*, 1871, L. R. 6 Q. B. p. 250 ; *Re Tickle*, 1886, 3 Morr. 126. Though formerly a condition that the lease should be void was construed literally : *Pennant's Case*, 1596, 3 Rep. 64 b. See 1 Sm. L. C. 10th ed. p. 41.

(*d*) See judgment of Denman, C.J., in *Roberts v. Davey*, 1833, 4 B. & Ad. p. 671.

(*e*) *Davenport v. Reg.*, 1877, 3 App. Cas. 115.

against assignment though not strictly in the form of a covenant (*f*). Where the lessor is entitled to re-enter "as if the indenture had never been made," he is not debarred from suing on the covenant for rent accrued before the forfeiture (*g*). It has been doubted whether non-insurance is a cause of forfeiture if under the lease the lessor is entitled to insure upon default, and to distrain for the premium (*h*).

It is for the lessor to prove that the forfeiture has been incurred. Hence, in forfeiture for breach of a covenant to insure, the omission to insure must be proved by the plaintiff. It is not sufficient that the lessee fails to produce the policy (*i*). The Court will not grant discovery of documents or give leave to administer interrogatories for the purpose of establishing a forfeiture (*k*).

Proof of forfeiture.

A proviso for re-entry can operate only during the existence of the term; hence it cannot be exercised so as to deprive a tenant, who is holding over, of his right to emblements (*l*). But if the tenant by paying rent while he is holding over becomes a yearly tenant, the proviso for re-entry on non-payment of rent attaches to this yearly tenancy (*m*); and a proviso for re-entry on breach of covenant contained in an agreement for lease was formerly held to apply to the yearly tenancy created by possession and payment of rent under the agreement (*n*); and this is clearly the case now that the agreement operates under such circumstances as a lease (*o*).

Forfeiture during holding over.

Before advantage can be taken of a proviso for re-entry for non-payment of rent, a formal demand of rent must be made (*p*); unless such demand has been either expressly dispensed with in the proviso or condition (*q*), or one half-

Demand of rent.

(*f*) *Brooks v. Drysdale*, 1877, 3 C. P. D. 52.

(*g*) *Hartshorne v. Watson*, 1838, 4 Bing. N. C. 178.

(*h*) *Doe v. Sutton*, 1841, 9 C. & P. 706.

(*i*) *Doe v. Whitehead*, 1838, 8 A. & E. 571. See *Doe v. Robson*, 1826, 2 C. & P. 245.

(*k*) *E. of Mexborough v. Whitwood Urban District Council*, 1897, 2 Q. B. 111; overruling *Seaward v. Dennington*, 1896, 44 W. R. 696.

(*l*) *Johns v. Whitley*, 1770, 3 Wils. 127, p. 140.

(*m*) *Thomas v. Packer*, 1857, 1 H. & N. 669.

(*n*) *Doe v. Amey*, 1840, 12 A. & E. 476; *Doe v. Breach*, 1806, 6 Esp. 106.

(*o*) *Supra*, p. 81.

(*p*) *Doe v. Robson*, 1826, 2 C. & P. 245; *Hill v. Kempshall*, 1849, 7 C. B. 975. See *Jackson v. Northampton Tramways Co.*, 1886, 55 L. T. 91.

(*q*) *Doe v. Masters*, 1824, 2 B. & C. 490.

year's rent is in arrear and no sufficient distress can be found on the premises (*r*). The demand must be of the sum due for rent for the last term of payment (*s*), and must be made at a convenient time before sunset on the last day of payment (*t*), and continued till sunset (*tt*). The demand must be made upon the land: if there is a house on the premises, at the front door of such house (*u*); or if the premises consist of lands and woods, upon the lands (*x*); or if they consist of woods only, at the gate of the wood, or at some highway leading through it, or other most notorious place (*y*). It is not material whether the tenant is there or not (*u*). The demand may, in the absence of the lessee, be made upon an undertenant or other stranger to the lessor (*yy*). If tender of the rent is made to him who is to receive it upon any part of the land, at any time on the last day of payment, the tender will save the condition (*y*).

Under certain circumstances the demand of the rent may be dispensed with, the Common Law Procedure Act, 1852, providing as follows:—

15 & 16 Vict.
c. 76, s. 210.

Where one half-year's rent is in arrear and landlord has right to re-enter, he may, instead of formal demand, serve writ in ejectment.

Where “one half-year's rent shall be in arrear (*z*), and the landlord, to whom the same is due, hath right by law to re-enter for the non-payment thereof (*a*), such landlord may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, which service shall stand in the place of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit (*b*), or be proved upon the trial in case the defendant appears, that

(*r*) 15 & 16 Vict. c. 76, s. 210; *infra*. See *Doe v. Wandlass*, 1797, 7 T. R. 117.

(*s*) See *Doe v. Paul*, 1829, 3 C. & P. 613; *Fabian v. Winston*, 1590, Cro. Eliz. 209; *Scot v. Scot*, 1587, Cro. Eliz. 73.

(*t*) Co. Litt. 202 a; *Doe v. Paul*, *supra*. See *Acocks v. Phillips*, 1860, 5 H. & N. 183. (*tt*) See *Wood and Chivers' Case*, 1573, 4 Leon. 179.

(*u*) Co. Litt. 201 b.

(*x*) Poph. 58.

(*y*) Co. Litt. 202 a.

(*yy*) See *Doe v. Brydges*, 1822, 2 D. & Ry. 29.

(*z*) There is not a half-year's rent in arrear if, though originally the arrears were greater than this, they have been made less by distraint: *Cotesworth v. Spokes*, 1861, 10 C. B. N. S. 103.

(*a*) The time prescribed before re-entry must have elapsed: *Doe v. Roe*, 1849, 7 C. B. 134.

(*b*) See *Cross v. Jordan*, 1852, 8 Ex. 149.

half-a-year's rent was due before the said writ was served, and (that the premises were locked up (*c*), or) that no sufficient distress was to be found (*d*) on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, in such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

The above enactment, in the cases to which it applies, Re-entry. dispenses with both demand and re-entry. The question whether, in general, re-entry was necessary before bringing ejectment on a forfeiture for breach of covenant was avoided under the old practice by the circumstance that the defendant, the lessee, by entering into the consent rule, confessed the lessor's entry. Consequently an actual re-entry was not necessary (*e*). Under the present practice the supposed re-entry does not take place, but the right of the lessor is not thereby affected, and he can still bring an action to recover possession without previously entering on the land (*f*). For the purpose of taking advantage of the forfeiture, bringing the action is equivalent to actual entry (*g*). The commencement of proceedings, consequently, is a final election by the lessor to determine the term, and, even though no judgment is obtained, he cannot afterwards treat the tenancy as subsisting, so as to sue for rent due, or covenants broken, subsequently to such commencement (*h*). A re-letting of the premises by the lessor to an undertenant of the lessee is a sufficient re-entry to avoid the lease (*i*).

Where a lease to a company contains a power of re-entry upon the company being wound up, the landlord's right to re-enter accrues on the making of a winding-up order, and is not deferred until the conclusion of the winding-up (*k*). Entry upon winding-up.

(*c*) *Hammond v. Mather*, 1862, 3 F. & F. 151. See *Doe v. Dyson*, 1827, M. & M. 77; *Doe v. Roe*, 1847, 5 D. & L. 272.

(*d*) See *Doe v. Franks*, 1847, 2 C. & K. 678.

(*e*) *Goodright v. Cator*, 1780, 2 Dougl. 477.

(*f*) *Ware v. Booth*, 1894, 10 T. L. R. 446. The question was left undecided in *Ex parte Dyke*, 1882, 22 C. D. 410.

(*g*) *Grimwood v. Moss*, 1872, L. R. 7 C. P. 360, per Willes, J., at p. 364.

(*h*) *Jones v. Carter*, 1846, 15 M. & W. 718.

(*i*) *Baylis v. Le Gros*, 1858, 4 C. B. N. S. 537.

(*k*) *General Share Co. v. Wetley Brick Co.*, 1882, 20 C. D. 260.

(iii.) *Waiver of Forfeiture.*

A forfeiture is waived if the lessor elects not to take advantage of it, and shows his election either expressly, by a statement to that effect to the lessee, or impliedly, by acknowledging the continuance of the tenancy (*l*). And if the lessor, after a cause of forfeiture has come to his knowledge, does anything whereby he recognizes the relation of landlord and tenant as still subsisting, he is precluded from saying that he did not do the act with the intention of waiving the forfeiture (*m*). Direct notice of the cause of forfeiture to the lessor is perhaps not necessary if such cause is equally within the cognizance of himself and the lessee (*n*), but in general both knowledge on the part of the lessor (*o*), and a positive act affirming the tenancy (*p*), are necessary to constitute a waiver. Mere acquiescence, as by standing by and seeing the lessee making alterations which are in breach of covenant (*q*), is not sufficient (*r*). A tenancy is affirmed, and—assuming knowledge on the part of the lessor—the forfeiture is waived, under the following circumstances:—

Acts amount-
ing to waiver.

1. Receipt of
rent.

Acceptance by the landlord from the tenant of rent which has accrued due since the cause of forfeiture (*s*). The rule applies to a Crown lease (*t*), and to receipt of rent from an undertenant (*u*), or from any other person, in satisfaction of rent (*x*). Payment into the lessor's banking account has been held to be a waiver, where such payment

(*l*) *Ward v. Day*, 1864, 5 B. & S. p. 362. See *Ex parte Newett*, 1881, 16 C. D. 522.

(*m*) *Toleman v. Portbury*, 1871, L. R. 6 Q. B. 245, p. 248. And see this case as to setting up two inconsistent grounds of forfeiture.

(*n*) *Harvey v. Oswald*, 1597, Cro. Eliz. 553, 572.

(*o*) *Pennant's Case*, 1596, 3 Rep. 64 a; *Roe v. Harrison*, 1788, 2 T. R. 425.

(*p*) *Green's Case*, 1582, Cro. Eliz. 3.

(*q*) *Perry v. Davis*, 1858, 3 C. B. N. S. 769.

(*r*) Per Heath, J., in *Doe v. Allen*, 1810, 3 Taunt. p. 81.

(*s*) *Goodright v. Davids*, 1778, Cowp. 803; *Pennant's Case*, 1596, 3 Rep. 64 b, note (B); *Arnsby v. Woodward*, 1827, 6 B. & C. 519; *Doe v. Rees*, 1838, 4 Bing. N. C. 384; *Doe v. Pritchard*, 1833, 5 B. & Ad. 765; *Miles v. Tobin*, 1868, 17 L. T. 432; *Pellatt v. Boosey*, 1862, 31 L. J. C. P. 281. See *Whitchot v. Fox*, 1617, Cro. Jac. 398. As to the distinction in *Pennant's Case*, 1596, 3 Rep. 64 b, between leases which are void and those which are voidable on breach of condition, see 1 Sm. L. C. 10th ed. 41; *supra*, p. 464.

(*t*) *Bridges v. Longman*, 1857, 24 Beav. 27.

(*u*) *Price v. Worwood*, 1859, 4 H. & N. 512.

(*x*) *Pellatt v. Boosey*, *supra*.

was usual, although the lessor had instructed the bank not to receive it, no step having been taken to inform the lessee or to return the rent (*y*). And the acceptance of subsequent rent bars a forfeiture for condition broken, as well as a forfeiture depending upon an express power of re-entry (*z*). The landlord cannot prevent the waiver by accepting the rent conditionally and without prejudice to his right to insist on the forfeiture (*a*).

But a forfeiture is not waived by the acceptance by the landlord of rent due before the forfeiture was incurred (*b*).

An absolute and unqualified demand of rent due after the forfeiture, made by a person having sufficient authority (*c*). 2. Demand of rent.

Bringing an action for rent accruing due subsequently to the forfeiture (*d*), or taking other proceedings, such as a claim to an injunction (*e*), based upon the continuance of the tenancy (*f*). Hence, where a writ claims possession for the forfeiture and also arrears of rent accruing due subsequently to the forfeiture, the latter claim operates as a waiver of the forfeiture (*g*); though if the breach is a continuing one—as in the case of non-repair—the lessor may still be entitled to forfeit in respect of the breaches subsequent to the date up to which rent has been claimed (*h*). 3. Action.

Distress for rent, whether due before or after the cause of forfeiture (*i*). 4. Distress.

The Landlord and Tenant Act, 1709, ss. 6, 7 (*l*), which

(*y*) *Pierson v. Harvey*, 1885, 1 T. L. R. 430.

(*z*) *Marsh v. Curteys*, 1598, Cro. Eliz. 528.

(*a*) *Davenport v. Reg.*, 1877, 3 App. Cas. 115; *Croft v. Lunley*, 1855, 5 E. & B. 648, see 6 H. L. C. 672, p. 744; *Griffin v. Tomkins*, 1880, 42 L. T. 359; *Strong v. Stringer*, 1889, 61 L. T. 470.

(*b*) *Green's Case*, 1582, Cro. Eliz. 3. See *Price v. Worwood*, 1859, 4 H. & N. 512.

(*c*) Per Parke, B., in *Doe v. Birch*, 1836, 1 M. & W. p. 408.

(*d*) *Roe v. Minshall*, 1760, Bull. N. P. 96; *Dendy v. Nicholl*, 1858, 4 C. B. N. S. 376.

(*e*) *Evans v. Davis*, 1878, 10 C. D. 747.

(*f*) *Pellatt v. Boosey*, 1862, 31 L. J. C. P. 281.

(*g*) *Bevan v. Barnett*, 1897, 13 T. L. R. 310.

(*h*) *Penton v. Barnett*, 1898, 1 Q. B. 276. See *Re Serle*, 1898, 46 W. R. p. 442.

(*i*) *Pennant's Case*, 1596, 3 Rep. 64 b; *Doe v. Peck*, 1830, 1 B. & Ad. 428; *Doe v. Williams*, 1835, 7 C. & P. 322 (as to waiver of disclaimer).

(*k*) 8 Anne, c. 14, *supra*, p. 250.

allows distress within six months after the determination of the tenancy, does not apply where the tenancy is determined by forfeiture (*l*); and, apart from the statute, a distress can only be made during the existence of the tenancy. Hence the distress recognizes the tenancy and operates as a waiver, unless it is capable of some other explanation, as where it is levied as a preliminary to showing insufficiency of distress and so gaining a title to sue in ejectment under sect. 210 of the Common Law Procedure Act, 1852 (*m*). And the mere continuing in possession of distress taken before the forfeiture is not a waiver (*n*).

But if the lessor has already commenced proceedings in ejectment, since this is a final determination to insist on the forfeiture (*o*), neither distress (*p*) nor the receipt of rent due subsequently to the forfeiture (*q*) operates as a waiver; though such receipt of rent may be evidence of a new tenancy from year to year on the old terms (*r*).

5. Recital.

A recital of the existence of the tenancy in an instrument subsequent to the forfeiture (*s*).

6. Agreement to grant new lease after expiration of forfeited lease.

An agreement by the landlord to grant a new term after the expiration by effluxion of time of a term in respect of which a forfeiture has been incurred (*t*).

7. Notice to repair.

Where there is a general covenant to repair, and also a covenant to repair after notice, a notice to repair within a specified period, as three months, is a waiver of the general covenant (*u*), and there is no forfeiture till the period has elapsed. Consequently there is no waiver of the forfeiture for breach of the special covenant by receipt, after the period

(*l*) *Grimwood v. Moss*, 1872, L. R. 7 C. P. p. 365; *Kirkland v. Briancourt*, 1890, 6 T. L. R. 441. See *Ward v. Day*, 1864, 5 B. & S. 359.

(*m*) 15 & 16 Vict. c. 76; *Thomas v. Lulham*, 1895, 2 Q. B. 400; *Brewer v. Eaton*, 1783, 3 Dougl. 230 (on the previous provisions of 4 Geo. 2, c. 28).

(*n*) *Doe v. Johnson*, 1816, 1 Stark. 411.

(*o*) *Supra*, p. 467.

(*p*) *Grimwood v. Moss*, 1872, L. R. 7 C. P. 360.

(*q*) *Doe v. Meux*, 1824, 1 C. & P. 346.

(*r*) *Evans v. Wyatt*, 1880, 43 L. T. 176.

(*s*) *Green's Case*, 1582, Cro. Eliz. 3.

(*t*) *Ward v. Day*, 1864, 5 B. & S. 359. See *Doe v. Curwood*, 1835, 1 Har. & W. 140.

(*u*) *Doe v. Meux*, 1825, 4 B. & C. 606. See also *Doe v. Lewis*, 1836, 5 A. & E. 277, cited *supra*, p. 317.

of the notice, of rent due while the notice was running (*x*). But where the notice is to repair “forthwith” (*y*), or “in accordance with the covenants of the lease” (*z*), the general covenant is not waived, and the lessor can enter at once for non-repair.

Where the breach of covenant causing a forfeiture is continuous (*a*), the receipt of rent, or other acknowledgment of tenancy by the landlord, will not preclude him from taking advantage of a forfeiture incurred subsequently to such acknowledgment (*b*).

Continuing breach.

A covenant to repair admits of continuing breach (*c*), and if the neglect continues from day to day, distress is no waiver of the forfeiture in respect of the subsequent breach (*d*). A covenant to insure is a continuing covenant, and a waiver extends only to past breaches (*e*). Where there is a covenant against assigning or demising the premises, or permitting any other person than the lessee to occupy them, and the lessee underlets, it has been held that permitting the underlessee to remain is not a continuing breach, and a distress with knowledge of the underletting is a waiver (*f*); but it seems to be different where the covenant is against using the premises otherwise than in a particular way, and a use by an underlessee in any other than such particular way may be a continuing breach on the part of the lessee (*g*). The lessor cannot insist on forfeiture for a continuing breach where he has both received rent and required repairs to be done (*h*).

According to the doctrine of *Dampor's Case* (*i*), a condition was not apportionable, and a waiver of a breach,

Effect of waiver restricted to breach to which it specially relates.

(*x*) *Cronin v. Rogers*, 1884, C. & E. 348.

(*y*) *Roe v. Paine*, 1810, 2 Camp. 520.

(*z*) *Few v. Perkins*, 1867, L. R. 2 Ex. 92. See *Cove v. Smith*, 1886, 2 T. L. R. 778.

(*a*) *Supra*, pp. 314, 359.

(*b*) *Doe v. Woodbridge*, 1829, 9 B. & C. 376; *Doe v. Jones*, 1850, 5 Ex. 498.

(*c*) *Coward v. Gregory*, 1866, L. R. 2 C. P. 153. See *Fryett v. Jeffreys*, 1796, 1 Esp. 393.

(*d*) *Doe v. Durnford*, 1832, 2 Cr. & J. 667.

(*e*) *Doe v. Gladwin*, 1845, 6 Q. B. 953.

(*f*) *Walrond v. Hawkins*, 1875, L. R. 10 C. P. 342.

(*g*) See judgment of Bramwell, L.J., in *Lawrie v. Lees*, 1880, 14 C. D. 249. Cf. 7 App. Cas. p. 30.

(*h*) *Griffin v. Tomkins*, 1880, 42 L. T. 359.

(*i*) 1603, 4 Rep. 119; 1 Sm. L. C. 10th ed. p. 31.

like a licence to do an act otherwise prohibited, dispensed with the condition altogether, and not merely in respect of the particular breach; but this effect of waiver has been removed by the Law of Property Amendment Act, 1859:—

22 & 23 Vict.
c. 35, s. 1.

Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this Act, in any one particular instance, such actual waiver shall not be deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver shall specially relate, or to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

(iv.) *Relief against Forfeiture.*

Relief against forfeiture can be granted under sect. 14 of the Conveyancing Act, 1881, except in the case of non-payment of rent, and in the other cases specially excluded from the operation of the section. Relief against forfeiture for non-payment of rent is provided for by statutes already in force in 1881. Relief in the other excepted cases can only be given under the special circumstances recognized as justifying the intervention of equity. The right to relief is a *chose in action* which, in the event of the bankruptcy of the lessee, vests in his trustee, and the trustee is entitled to sell such right and assign it to the purchaser (*k*).

(a) RELIEF UNDER THE CONVEYANCING ACTS.

Conveyancing
Act, 1881 (*l*).
s. 14, sub-s. (1).
No forfeiture
till after
notice to
repair breach.

A right of re-entry or forfeiture under any proviso or stipulation in a lease (*m*), for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the

(*k*) *Howard v. Fanshawe*, 1895, 2 Ch. 581, 589. (*l*) 44 & 45 Vict. c. 41.

(*m*) Lease includes an original or derivative underlease, and the terms "lessee" and "lessor" have corresponding meanings: sub-sect. (3). As to "assigns," see *Matthews v. Usher*, 1899, 68 L. J. Q. B. 988. Relief can be given to an underlessee of part of the premises in respect of a breach of a covenant contained in the headlease under the Conv. Act, 1892, s. 4, which remedies the defect revealed by *Burt v. Gray*, 1891, 2 Q. B. 98.

lessee to remedy the breach (*n*), and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable (*nn*) time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply (*o*) to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms (*oo*), if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

Sub-sect. (2).
Relief against
forfeiture.

Sect. 14 applies to leases made either before or after the commencement of the Act, and has effect notwithstanding any stipulation to the contrary.

Sub-sect. (9).

It was held by Kay, J., that, even though notice had not been served under sub-sect. (1), sub-sect. (2) left it discretionary with the Court to refuse relief (*p*); but the correct view appears to be that the serving of the notice is a necessary preliminary to insisting on the forfeiture (*q*). It is not necessary that the notice should require payment of compensation in money (*r*). It is sufficient if it is addressed to the lessee by that designation without his

Notice to
repair breach.

(*n*) A notice requiring the lessee to repair "within one month or a reasonable time thereafter," when the lease allows three months, is good within this provision: *Re Serle*, 1898, 1 Ch. 652.

(*nn*) See *Horsely Estate, Lim. v. Steiger*, 1899, 2 Q. B. 79.

(*o*) As to mode of applying, see *Highgate School v. Sewell*, 1893, 2 Q. B. 254; *Ruttledge v. Whelan*, 1882, 10 L. R. 1r. 263.

(*oo*) As to compelling a tenant who has executed the repairs to come in and have the terms of relief settled, see *West v. Rogers*, 1888, 4 T. L. R. 229.

(*p*) *Scott v. Brown & Co.*, 1885, 51 L. T. 746.

(*q*) *Greenfield v. Hanson*, 1886, 2 T. L. R. 876. See *Jacques v. Harrison*, 1884, 12 Q. B. D. p. 167.

(*r*) *Lock v. Pearce*, 1893, 2 Ch. 271; disapproving *N. London Freehold Land Co. v. Jacques*, 1884, 49 L. T. 659, which had been followed in *Greenfield v. Hanson*, 1886, 2 T. L. R. 876.

name(s), and, if the lease has been assigned, a notice addressed to the original lessee and "all others whom it may concern," and served on the person in occupation, is sufficiently addressed to, and validly served on, the assignee(t). The notice must be such as will enable the tenant to understand with reasonable certainty what it is which he is required to do. It must be so distinct as to direct his attention to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action is brought to enforce the forfeiture(u). A notice by the lessor to the lessee, "You have broken the covenants for repairing the inside and outside of the houses," specifying the premises, but not giving any details of the want of repair, is insufficient(u).

Relief.

A lessee who desires to obtain relief must apply before the lessor has actually re-entered(x), and, if no action is pending by the lessor, he must commence proceedings by writ. He cannot apply by originating summons(y). But relief can be granted in appropriate proceedings although not claimed by the pleadings(z), and relief has been granted against breach of a covenant to repair, although the premises were in a very dilapidated condition(z). It was held, shortly after the passing of the Act, that it applied to proceedings pending at the passing of the Act in respect of breaches previously committed(a).

Compensation.

The lessee will be required to make compensation only where there is some damage to be made good, and the

(s) Conv. Act, 1881, s. 67. (t) *Cronin v. Rogers*, 1884, C. & E. 348.

(u) *Fletcher v. Nokes*, 1897, 1 Ch. 271; *Matthews v. Usher*, 1899, 68 L. J. Q. B. 988. See *Re Serle*, 1898, 1 Ch. 652. The notice may be as follows:—

To Mr. C. D

I hereby give you notice that you have broken the covenant contained in your lease dated the — day of —, 18—, of [describe premises] for painting the outside of the said premises at the end of the third year of your tenancy, and I require you to paint the outside of the said premises in accordance with the said covenant and to pay me £— by way of compensation for the said breach.

Dated the — day of —, 18—. E. F.

But usually the details will be numerous, and there will be a schedule of dilapidations.

(x) *Rogers v. Rice*, 1892, 2 Ch. 170.

(y) *Lock v. Pearce*, 1893, 2 Ch. 271.

(z) *Mitchison v. Thomson*, 1883, C. & E. 72.

(a) *Quilter v. Mapleson*, 1882, 9 Q. B. D. 672.

compensation is measured by the same rule as damages in an action for the breach of covenant (*b*). It was held that the demand for compensation in the notice before forfeiture could not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice under sub-sect. (1) (*b*); but such expenses are now recoverable under the Conveyancing Act, 1892 (*c*), though not by the lessor against an underlessee (*d*), or against a lessee who complies with a notice under sect. 14 (1), and so saves the forfeiture (*d*).

In sect. 14 of the Conveyancing Act, 1881, as amended by the Act of 1892, and in the Act of 1892, "lease" includes an agreement for a lease where the lessee has become entitled to have his lease granted (*e*); and "underlease" includes an agreement for an underlease where the underlessee has become entitled to have his underlease granted. But a lessee who has entered under an agreement for a lease, and has committed breaches of covenants contained in the agreement which were to be inserted in the lease, is not entitled to have his lease granted—that is, to specific performance of the agreement—and cannot obtain relief under sect. 14 (*f*).

Conveyancing Act, 1892, s. 5.
Agreements for leases.

Sect. 14 does not extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased (*g*); or to a condition for forfeiture on the bankruptcy of the lessee (*h*), or on the taking in execution of the lessee's interest; or to certain covenants in mining leases. But by sect. 2 (2) of the Conveyancing Act, 1892, the exclusion of forfeiture on

Conveyancing Act, 1881, s. 14, sub-s. (6).
Cases excluded from relief.

(*b*) *Skinnners' Co. v. Knight*, 1891, 2 Q. B. 542. But the restriction does not apply where the Court is settling terms of relief under sub-sect. (2), and payment may be required of the lessor's costs as between solicitor and client, as well as the cost of survey and schedules of dilapidations: *Bridge v. Quick*, 1892, 61 L. J. Q. B. 375; *Bond v. Freke*, W. N. 1884, p. 47.

(*c*) 55 & 56 Vict. c. 13.

(*d*) *Nind v. Nineteenth Century Building Society*, 1894, 2 Q. B. 226.

(*e*) See *Swain v. Ayres*, 1888, 21 Q. B. D. 289; *Strong v. Stringer*, 1889, 61 L. T. 470. (*f*) *Coatsworth v. Johnson*, 1886, 55 L. J. Q. B. 220.

(*g*) But there is no such restriction in sect. 4 of the Act of 1892, and an underlessee can be relieved under that section against forfeiture of the original lease for breach of a covenant against assigning or underletting; but the jurisdiction appears to be exercised so sparingly as to be almost valueless. See *Emray v. Oakshette*, 1897, 2 Q. B. 218. And as to forfeiture in bankruptcy, *Highgate School v. Sewell*, 1894, 2 Q. B. 906.

(*h*) See *Ex parte Gould*, 1884, 13 Q. B. D. 454.

bankruptcy or execution is modified in favour of creditors, and on their behalf relief can be obtained within a year. This modification does not apply, however, to leases of (a) agricultural or pastoral land; (b) mines or minerals; (c) public-houses; (d) furnished houses; or (e) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the property, or on the ground of neighbourhood to the lessor or his tenants.

(b) RELIEF IN RESPECT OF NON-PAYMENT OF RENT.

Sect. 14 of the Conveyancing Act, 1881, does not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (*i*). In such cases equity formerly granted relief on payment of the rent with full costs (*k*), but it is now provided by statute that this can only be done within six months after execution executed (*l*), and the mode of granting relief is regulated by statute, and a similar jurisdiction was conferred upon the Courts of common law (*m*). The jurisdiction is now exercisable by the High Court (*n*). Relief is granted only upon payment to the landlord or into court of the rent and costs (*o*).

(c) RELIEF IN OTHER CASES.

For breaches of covenants other than for payment of a sum of money, Courts of equity gave relief only upon the grounds of fraud, accident, surprise or mistake (*p*). In the

(*i*) Sub-sect. 8.

(*k*) See cases referred to in *Howard v. Fanshawe*, 1895, 2 Ch. pp. 586, 587. But relief ought not to be granted unless the landlord and other parties interested can be put in the same position as before: *Stanhope v. Haworth*, 1886, 3 T. L. R. 34.

(*l*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210. See *Bowser v. Colby*, 1841, 1 Hare, p. 125, on the earlier provision to the same effect in 4 Geo. 2, c. 28. Relief can also be granted where the lessor has resumed possession without the assistance of the Court; but in such a case it seems that the lessee would be limited, on the analogy of the statute, to six months from the re-entry: *Howard v. Fanshawe*, 1895, 2 Ch. 581, 589. (*m*) 23 & 24 Vict. c. 126, s. 1.

(*n*) See *Wilson v. Bolton*, 1893, 10 T. L. R. 17. As to relief to an underlessee, see *Doe v. Byron*, 1845, 1 C. B. 623; and as to relief in favour of a mortgagee by subdemise, see *Newbolt v. Bingham*, 1895, 72 L. T. 852; *Hare v. Elms*, 1893, 1 Q. B. 604.

(*o*) See C. L. P. A. 1852, s. 211. As to costs, see *Croft v. London and County Banking Co.*, 1885, 14 Q. B. D. 347.

(*p*) *Gregory v. Wilson*, 9 Hare, p. 689; *Hill v. Barclay*, 1811, 18 Ves.

absence of such special circumstances there was, for instance, no jurisdiction to grant relief in respect of a breach of a covenant not to assign or underlet without consent (*q*), not to permit a way over the land (*r*), or of a covenant to repair (*s*). And the jurisdiction is now similarly limited in cases not falling within sect. 14 of the Conveyancing Act, 1881. Where a breach of a covenant against underletting was due to the lessee's solicitor forgetting that the consent of the lessor was required, the Court refused to grant relief (*t*). Either this was not a "mistake" within the meaning of the rule (*u*), or at any rate, since it was due to negligence for which the lessee was responsible, the case was not one in which a Court of equity would interpose to grant relief (*x*).

p. 62; *Bamford v. Creasy*, 1862, 3 Giff. 675; *Bargent v. Thompson*, 1863, 4 Giff. 473. See judgment of Kay, L.J., in *Barrow v. Isaacs*, 1891, 1 Q. B. 417, p. 425. The statutory jurisdiction to grant relief in respect of non-insurance (22 & 23 Vict. c. 35, ss. 4—6; 23 & 24 Vict. c. 126, s. 2) is replaced by the provisions of sect. 14 of the C. A. 1881.

(*q*) *Hill v. Barclay*, 1811, 18 Ves. 56, at p. 63.

(*r*) *Descarlett v. Dennett*, 1722, 9 Mod. 22.

(*s*) *Hill v. Barclay*, *supra*; *Gregory v. Wilson*, 1852, 9 Hare, 683; *Bracebridge v. Buckley*, 1816, 2 Price, 200.

(*t*) *Barrow v. Isaacs*, 1891, 1 Q. B. 417. See *Eastern Telegraph Co. v. Dent*, 1899, 1 Q. B. 835.

(*u*) Per Lord Esher, M.R., in *Barrow v. Isaacs*, *ubi supra*, p. 422.

(*x*) Per Lopes and Kay, L.JJ., pp. 422, 426.

CHAPTER VII.

TERMS OF QUITTING.

	PAGE
SECT. I. FIXTURES	479
(1) What articles are fixtures	479
Mode of annexation	479
Object of annexation	481
Whether for temporary or permanent purpose	482
(2) Tenant's right to fixtures where there is no express agreement	484
(i) Trade fixtures	484
(ii) Agricultural fixtures	488
Agricultural Holdings Act, 1883	489
(iii) Ornamental fixtures	490
(iv) Time of removal	492
(3) Tenant's right under express agreement	494
SECT. II. EMBLEMENTS	497
(1) In what cases they may be claimed	497
(2) Provision as to tenants of landlords entitled for uncertain interests	498
SECT. III. AWAY-GOING CROPS AND COMPENSATION FOR TILLAGES, &c.	498
SECT. IV. STATUTORY COMPENSATION FOR IMPROVEMENTS	502
(1) The Agricultural Holdings Act, 1883	502
(2) The Allotments, &c. Act, 1887	510
(3) The Tenants' Compensation Act, 1890	511
(4) Market Gardeners' Compensation Act, 1895	511
SECT. V. DELIVERY OF POSSESSION	512
(1) Tenant's obligation to give possession	512
Encroachments	513
(2) Landlord's remedies for recovering possession	514
(i) Indirect	514
Action for double value	514
Action or distress for double rent	517
(ii) Direct	518
Entry	518
Forcible entry	518
Statute of Limitations	519
Action in the High Court	523
" " County Court	525
Action to recover possession	525
" for the recovery of land	526
Proceedings before justices	527
Houses at rents not exceeding 20l. a year	527
Deserted premises	530

SECT. I.—FIXTURES.

A CHATTEL which is annexed to the freehold by the tenant in such manner and under such circumstances as to become a part of the freehold is a fixture. Ordinarily the property in fixtures passes to the landlord, in accordance with the maxim, *Quicquid plantatur solo, solo cedit* (a); but the tenant may be entitled, either under the general law or under the terms of his agreement, to sever the fixture and to regain his property in it (a). Hence it is necessary to ascertain (1) what articles are fixtures; (2) when a tenant is entitled to remove fixtures in the absence of express agreement; (3) when a tenant is entitled to remove them under the terms of his agreement.

(1) WHAT ARTICLES ARE FIXTURES.

The question whether a chattel is so fixed as to become parcel of the freehold is a question of fact depending on the circumstances of each case, and principally on two considerations:—First, the mode of annexation to the soil or to the fabric of the building, and the extent to which it is united to them; whether it can be easily removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building: and secondly, the object and purpose of the annexation; whether it was for the permanent and substantial improvement of the dwelling or of the inheritance, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel (b).

Tests whether article a fixture.

It has been said that a fixture is anything annexed to the freehold—that is, fastened to or connected with it, not in mere juxtaposition to the soil (c). In general, articles standing merely by their own weight upon the ground, or upon foundations prepared for them, are not fixtures. Thus

1. Mode of annexation.

(a) *Bain v. Brand*, 1876, 1 App. Cas. 762, judgment of Lord Chelmsford, p. 772. See *Gibson v. Hammersmith Ry. Co.*, 1862, 2 Dr. & Sm. p. 608. As to the limitations upon this maxim, see *Wake v. Hall*, 1883, 8 App. Cas. 195.

(b) Per Parke, B., in *Hellawell v. Eastwood*, 1851, 6 Ex. 295; approved in *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328, though the correctness of the decision in *Hellawell v. Eastwood* on the facts was doubted.

(c) Per Lord Chelmsford in *Bain v. Brand*, 1876, 1 App. Cas. p. 772; and see the definition of a fixture in Amos and Ferrard on Fixtures, 3rd ed. p. 2, quoted in *Turner v. Cameron*, 1870, L. R. 5 Q. B. p. 311.

Instances of
non-fixtures.

the following articles or erections have been held not to be fixtures: a barn placed upon pattens and blocks of timber lying upon the ground (*d*), or upon a foundation of brick and stone (*e*); a wooden windmill resting upon a brick foundation (*f*); vats supported by and rested on brickwork and timber, but not fixed in the ground (*g*); tanks, mash-tuns, &c., in a distillery, heavy and unattached, except by communicating pipes, to the walls or to the piers on which they stand (*h*); cisterns standing by their own weight (*i*); metal plates laid on the ground for flooring (*k*); weighing-machines placed in holes dug in the ground and lined with brickwork so that the weighing-plate is on a level with the surface of the ground (*l*); tram lines fastened to sleepers laid upon the ground, notwithstanding that they have sunk into the ground owing to the pressure of the traffic (*m*), provided the soil has not been specially prepared to receive them (*n*).

Instances of
fixture.

On the other hand, the cases in which the annexation has been held sufficient to constitute the article a fixture are numerous. The matter admits of little doubt where the chattel cannot be removed without great damage to the land (*o*), but an article easily removable may nevertheless be a fixture. The following articles have been held to be fixtures: stills set in brickwork and let into the ground (*p*); a steam-hammer screwed to stone fastened with mortar to a foundation in the ground (*k*), and a boiler and furnace fixed in brickwork (*k*); a gas-engine fastened by bolts and screws to a bed of concrete (*r*); a portable engine and

(*d*) *Culling v. Tuffnal*, 1694, Bull. N. P. 34. See *Wiltshier v. Cottrell*, 1853, 1 E. & B. 674.

(*e*) *Wansbrough v. Maton*, 1836, 4 A. & E. 884.

(*f*) *R. v. Otley*, 1830, 1 B. & Ad. 161; *R. v. Londonthorpe*, 1795, 6 T. R. 377.

(*g*) *Horn v. Baker*, 1808, 9 East, 215.

(*h*) *Chidley v. West Ham*, 1874, 32 L. T. 486.

(*i*) *Mather v. Fraser*, 1856, 2 K. & J. 536, 559.

(*k*) *Metrop. Counties Society v. Brown*, 1859, 26 Beav. 454, 461.

(*l*) *Ex parte Astbury*, 1869, 4 Ch. 630.

(*m*) *D. of Beaufort v. Bates*, 1862, 3 D. F. & J. 381. See *Wood v. Hewett*, 1846, 8 Q. B. p. 919; *Huntley v. Russell*, 1849, 13 Q. B. p. 577, note (*o*).

(*n*) See *Turner v. Cameron*, 1870, L. R. 5 Q. B. 306.

(*o*) *Wake v. Hall*, 1883, 8 A. C. 195, 204.

(*p*) *Horn v. Baker*, 1808, 9 East, 215, 222.

(*r*) *Hobson v. Gorringe*, 1897, 1 Ch. 182.

boiler bolted to a wooden framework, the framework being embedded in mortar laid upon a brick foundation (*s*); steam-engine, hay-cutter, and malt-mill fastened with screws and nuts (*t*); an engine screwed down to thick planks which lie upon the ground, and a boiler fixed in brick-work (*u*); straightening-plates embedded in the floor of a mill (*x*); a railway nailed to sleepers laid in ballast (*y*); a steam-crane screwed on to large stones cramped together and laid on a prepared bed of mortar, the crane being kept in position by guys (*z*); looms in a cotton-mill fastened by nails through the loom feet to wooden plugs in the floor (*a*), or to beams built into the floor (*b*); machinery annexed to the floor, ceilings, or sides of a building in a "quasi-permanent manner" by means of bolts and screws (*c*); steam-engines and boilers and mill-gear fastened in a mill and not standing merely by their own weight (*d*); the sign-board of an inn, which on account of its special value has been removed to the inside of the inn and affixed to the wall of the hall (*e*); a greenhouse the framework of which is laid upon walls built for the purpose and which is fastened to them with mortar (*f*). It has been questioned, perhaps unnecessarily, whether a building becomes a fixture till it is completed; but at any rate, if the landlord supplies the materials, these cannot be taken away by the tenant (*g*).

But the test of physical annexation is not sufficient. When an article is no further attached to the land than by its own weight, it is in general considered to be a mere chattel; but even in such a case the article will become

2. The object of annexation.

(*s*) *Cross v. Barnes*, 1877, 46 L. J. Q. B. 479.

(*t*) *Walmsley v. Milne*, 1859, 7 C. B. N. S. 115.

(*u*) *Clinie v. Wood*, 1869, L. R. 3 Ex. 257; L. R. 4 Ex. 328.

(*x*) *Ex parte Astbury*, 1869, 4 Ch. 630.

(*y*) *Turner v. Cameron*, 1870, L. R. 5 Q. B. 306; *Ex parte Moore & Robinson's Banking Co.*, 1880, 14 C. D. 379, 386.

(*z*) *Ex parte Moore & Robinson's Banking Co.*, *supra*. See *Davis v. Jones*, 1818, 2 B. & A. 165, where jibs fixed in a warehouse and easily removable were held to be chattels.

(*a*) *Boyd v. Shorrock*, 1867, 5 Eq. 72.

(*b*) *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328.

(*c*) *Loughbottom v. Berry*, 1869, L. R. 5 Q. B. 123.

(*d*) *Mather v. Fraser*, 1856, 2 K. & J. 536. Cf. *Lincolnshire Finance Co. v. Farrant*, 1886, 2 T. L. R. 248.

(*e*) *Ex parte Willoughby D'Eresby*, 1881, 44 L. T. 781.

(*f*) *West v. Blakeray*, 1841, 2 M. & Gr. p. 729; *Jenkins v. Gething*, 1862, 2 J. & H. 520. (*g*) *Smith v. Render*, 1857, 27 L. J. Ex. 83.

part of the land if such appears to be the intention (*h*). Thus a wall built with blocks of stone without mortar is a fixture, though the stones stacked in the same shape in a builder's yard would be chattels. The question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the case of the grindstone of a flour-mill (*i*). So, statues and vases and stone garden seats, though resting by their own weight, are fixtures if they are part of the architectural design of the premises. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel (*k*).

Whether for
a temporary
or permanent
purpose.

And even though the physical annexation might be sufficient to constitute a fixture, it is further necessary to determine whether the article has been affixed for a temporary or permanent purpose. Things which are affixed to a building for its permanent improvement, such as doors and windows, are fixtures (*l*); and so are pictures in panels and tapestry (*m*), and machinery erected for the better enjoyment of land (*n*). On the other hand, articles annexed to the building for a temporary purpose or the more complete use of them as chattels are not fixtures. An instance

(*h*) *Holland v. Hodgson*, 1872, L. R. 7 C. P. p. 335. But the intention can only be proved from the degree and object of the annexation: *S. C.*; unless, indeed, there is also evidence of an agreement as to the articles, see *Wood v. Hewett*, 1846, 8 Q. B. p. 919, and *Mant v. Collins*, there cited.

(*i*) *D'Eyncourt v. Gregory*, 1866, 3 Eq. 382, at p. 396. The case of a natural history collection was discussed in *Viscount Hill v. Bullock*, 1897, 2 Ch. 482, and it was held that the collection was not a fixture so as to pass, with the house, to the devisee. (*k*) *Holland v. Hodgson*, *ubi sup.*

(*l*) Co. Litt. 53 a; *Herlakenden's Case*, 1589, 4 Rep. 64 a; *Climie v. Wood*, 1869, L. R. 4 Ex. 328.

(*m*) *D'Eyncourt v. Gregory*, 1866, 3 Eq. 382.

(*n*) *Fisher v. Dixon*, 1845, 12 Cl. & F. 312.

commonly referred to is a carpet stretched on the floor by nails. This is not a fixture (*o*), nor are curtains, looking-glasses, pictures, and other matters of an ornamental nature which have been slightly attached to the walls of a dwelling as furniture (*p*).

In *Hellawell v. Eastwood* (*pp*) it was held that spinning mules fixed, some by screws to the wooden floor of a mill, and some by screws fastened with lead into holes in the floor, were not fixtures, on the ground that they were affixed for a temporary purpose, the object of the annexation not being to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. But this appears to have been erroneous both in the use of the word "temporary" and in the object assigned for the annexation. The annexation is not temporary if it is intended to last during the interest of the tenant in the premises (*q*), and if the machines, although steadied by the annexation and made more useful as machines, were really meant to enhance the value of the mill. Hence, in other similar cases, machines have been held to be fixtures (*r*). But a hydraulic press, fixed by bricks and mortar to the floor of a factory, which is a convenience, but not essential to carrying on the works, has been held to be a chattel (*s*), and so has a switchback railway, upon the ground that it was erected, not for the purpose of enhancing the value of the land, but only for the purpose of its more convenient use as machinery (*t*).

Machines in a factory.

A gas-meter fixed in a private house is a chattel (*u*); but the retorts, boilers, gas-holders, &c., at gas works, which are essential for the purpose of the works, are fixtures (*x*).

(*o*) *Hellawell v. Eastwood*, 1851, 6 Ex. 295, p. 313; *Boyd v. Shorrock*, 1867, 5 Eq. p. 79.

(*p*) *Hellawell v. Eastwood*, *loc. cit.*; *Climie v. Wood*, 1869, L. R. 4 Ex. p. 329. (*pp*) *Supra*. See *Waterfall v. Penistone*, 1856, 6 E. & B. 876.

(*q*) See judgment of Wood, V.-C., in *Boyd v. Shorrock*, 1867, 5 Eq. 72; *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328.

(*r*) *Holland v. Hodgson*, *supra*; *Mather v. Fraser*, 1856, 2 K. & J. 536; *Longbottom v. Berry*, 1869, L. R. 5 Q. B. 123; *Cross v. Barnes*, 1877, 46 L. J. Q. B. 479; *Wabmsley v. Milne*, 1859, 7 C. B. N. S. 115.

(*s*) *Parsons v. Hind*, 1866, 14 W. R. 860.

(*t*) *Chamberlayne v. Collins*, 1894, 70 L. T. 217.

(*u*) But a gaselier passes upon the sale of a house with fixtures: *Sewell v. Angerstein*, 1868, 18 L. T. 300.

(*x*) *R. v. Lee*, 1866, L. R. 1 Q. B. 241.

Physical
connection
not essential.

Physical connection with the land is not essential to constitute a fixture. Keys are so identified with a house as to rank as fixtures; and it is the same with the stone belonging to a mill (*y*). Similarly when machinery becomes a fixture, parts of it which are not fixed, but which are essential to its working, are fixtures also (*z*).

(2) TENANT'S RIGHT TO REMOVE FIXTURES WHERE THERE IS NO EXPRESS AGREEMENT.

Relaxations
in favour
of tenant.

The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste (*a*); and the fact that the tenant cannot commit waste is the only reason why he cannot pull down and remove buildings during the term (*b*). In the progress of time, however, the rule has been relaxed by judicial decision in the case of fixtures put up for the purposes of trade or for ornament and domestic utility (*c*), and by statute in the case of agricultural fixtures. Relaxations in the strict rule of the ownership of fixtures have also been made as between the executor of a tenant for life and the remainderman, and perhaps as between the executor and the heir of a tenant in fee. But the greatest latitude in favour of the removal of fixtures is allowed in the case of landlord and tenant (*d*), and consequently decisions in favour of the executor in the other two cases are *a fortiori* decisions in favour of a tenant.

(i.) *Trade Fixtures.*

Rule as to
removal of
trade fixtures.

A tenant of premises who has himself erected fixtures for

(*y*) *Moody v. Steggles*, 1879, 12 C. D. p. 267. See *Place v. Fagg*, 1829, 4 M. & Ry. 277.

(*z*) *Fisher v. Dixon*, 1845, 12 Cl. & F. p. 330; *Ex parte Astbury*, 1869, 4 Ch. 630; *Metrop. Counties Society v. Brown*, 1859, 26 Beav. 454, 459; *Mather v. Fraser*, 1856, 2 K. & J. 536; *Sheffield Building Society v. Harrison*, 1885, 15 Q. B. D. 358 (leathern belts for driving machinery).

(*a*) Per Lord Ellenborough, C.J., in *Elves v. Maw*, 1803, 3 East, p. 51; per Dallas, C.J., in *Buckland v. Butterfield*, 2 Br. & B. at p. 58.

(*b*) Per Selborne, L.C., in *Wake v. Hall*, 1880, 7 Q. B. D. p. 301. As to damages where tenant fails to deliver up fixtures to a landlord who has mortgaged them, see *Watson v. Lane*, 1850, 11 Ex. 769.

(*c*) See *Climie v. Wood*, 1869, L. R. 4 Ex. p. 329; *Holland v. Hodgson*, 1872, L. R. 7 C. P. p. 333; *Gibson v. Hammersmith Ry. Co.*, 1862, 2 Dr. & Sm. pp. 608, 609.

(*d*) *Elves v. Maw*, 1803, 3 East, p. 51; *Whitehead v. Bennett*, 1858, 27 L. J. Ch. p. 475.

the purposes of his trade may at any time within the term remove them, provided they can be removed without material injury to the freehold (*e*). This relaxation is allowed at common law, and not by virtue of any special custom, in favour of trade and to encourage industry (*f*) ; or, as it has been also said, in support of the interests of trade, which is become the pillar of the state (*g*). Thus the tenant can remove machinery and utensils of a chattel nature, such as salt-pans (*h*), vats, &c., for soap-boiling (*i*), engines for working collieries (*k*) or other trade purposes (*l*) ; and also buildings of a slight description erected by the tenant for the purpose of carrying on his business, such as a varnish house, though on a brick foundation (*m*), or a shed, called a Dutch barn, set up for trading purposes (*n*). But a substantial building, although erected for the sole purpose of trade, cannot be removed (*o*), unless it is merely accessory to trade fixtures (*p*). The right of removal exists where things can be taken away bodily, or, if by reason of their bulk and complexity it should be necessary to take them to pieces, they can be put together in the same form in some other place (*q*).

Ordinarily a tenant cannot remove trees or shrubs (*r*), and a farmer who raises young fruit trees on the demised land for the purpose of filling up the lessor's orchards is not entitled to remove them (*s*). But a nurseryman, in

(*e*) Per Kindersley, V.-C., in *Gibson v. Hammersmith Ry. Co.*, 1862, 2 Dr. & Sm. p. 608 ; *Lawton v. Salmon*, 1782, 1 H. Bl. 259, note (*a*).

(*f*) Per Holt, C.J., in *Poole's Case*, 1704, 1 Salk. 368 ; *Elwes v. Maw*, 1803, 3 East, p. 52.

(*g*) Per Kenyon, C.J., in *Penton v. Robart*, 1801, 2 East, p. 90.

(*h*) *Lawton v. Salmon*, 1782, 1 H. Bl. 259, note (*a*).

(*i*) *Poole's Case*, *supra*.

(*k*) *Lawton v. Lawton*, 1743, 3 Atk. 13 ; *Dudley v. Warde*, 1751, Ambl. 113 ; *Ward v. Countess of Dudley*, 1887, 57 L. T. 20.

(*l*) *Clinie v. Wood*, 1869, L. R. 4 Ex. 328, 330.

(*m*) *Penton v. Robart*, 1801, 2 East, 88.

(*n*) *Dean v. Allaley*, 1799, 3 Esp. 11. See *Fitzherbert v. Shaw*, 1789, 1 H. Bl. 258, decision of Gould, J.

(*o*) *Whitehead v. Bennett*, 1858, 27 L. J. Ch. 474 ; *Wake v. Hall*, 1880, 7 Q. B. D. p. 301. See *Thresher v. E. London Waterworks*, 1824, 2 B. & C. 608.

(*p*) *Lawton v. Lawton*, 1743, 3 Atk. 13, 16 ; per Lord Bramwell, in *Wake v. Hall*, 1883, 8 App. Cas. p. 210 ; though in *Whitehead v. Bennett* Kindersley, V.-C., held that this fact did not make the building removable.

(*q*) *Whitehead v. Bennett*, *ubi sup.* p. 475.

(*r*) *Empson v. Soden*, 1833, 4 B. & Ad. p. 657.

(*s*) *Wynndham v. Wray*, 1812, 4 Taunt. 316.

addition to his statutory rights presently mentioned, is entitled to remove trees and shrubs grown for sale (*t*); and also, perhaps, hothouses erected by him (*u*); but mere destruction is not allowed (*x*).

Market
gardens and
allotments.

In the case of market gardens the tenant may remove all fruit trees and fruit bushes planted by him and not permanently set out; but if he does not remove them before the termination of his tenancy, they remain the property of the landlord, and the tenant is not entitled to any compensation (*y*). The tenant of an allotment under the Allotments Act, 1887 (*z*), may, before the expiration of his tenancy, remove any fruit and other trees and bushes, planted or acquired by him, for which he has no claim for compensation (*a*). He may also, before the expiration of his tenancy, remove any building which he is permitted under the statute to erect upon the allotment—*i.e.* a tool-house, shed, greenhouse, fowl-house, or pig-stye (*b*).

Custom.

It seems that a custom of the neighbourhood as to the removal of articles erected by a tenant may be taken as an explanation of their nature and character (*c*).

Removal
must be
without
injury to
freehold.

Trade fixtures can only be removed if the removal can be effected without material injury to the freehold (*d*). If they cannot be removed without material injury, the tenant has no right to inflict that injury or to remove them at all (*e*).

(*t*) *Wyndham v. Way*, 1812, 4 Taunt. 316, per Heath, J.; *Penton v. Robart*, 1801, 2 East, p. 90; *Oakley v. Monck*, 1866, L. R. 1 Ex. p. 167; *Wardell v. Usher*, 1841, 3 Sc. N. R. 508.

(*u*) Per Lord Kenyon, C.J., in *Penton v. Robart*, *loc. cit.*; but see *Elwes v. Maw*, 1802, 3 East, p. 56; *Buckland v. Butterfield*, 1820, 2 Br. & B. at p. 58; Amos and Ferard on Fixtures, 3rd ed. p. 103. In Scotland greenhouses erected by nursery gardeners have been held to be removable, at any rate so far as they do not consist of brickwork: *Syme v. Harvey*, 1861, 24 Sess. Cas. 2nd series, 202.

(*x*) *Oakley v. Monck*, *supra*; *Watherell v. Howells*, 1808, 1 Camp. 227.
(*y*) Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 3 (5). As to the holdings to which the Act applies, *vide infra*, p. 511. As to the right under the Act to remove fixtures and buildings, *vide infra*, p. 490.

(*z*) 50 & 51 Vict. c. 48

(*a*) Sect. 7 (6).

(*b*) Sect. 7 (5).

(*c*) Judgment in *Davis v. Jones*, 1818, 2 B. & A. p. 168; *Trappes v. Harter*, 1833, 2 Cr. & M. p. 181; *Culling v. Tuffnall*, 1694, Bull. N. P. 34.

(*d*) *Trappes v. Harter*, 1833, 2 Cr. & M. p. 181.

(*e*) *Gibson v. Hammersmith Ry. Co.*, 1862, 2 Dr. & Sm. p. 608. See *Wake v. Hall*, 1883, 8 App. Cas. p. 205.

But for the purpose of the removal of fixtures trifling damage is not regarded (*f*).

A railway company which takes leasehold premises compulsorily is bound to take the trade fixtures as well (*g*). Compulsory purchase.

The rules as to the right of removing fixtures which have been established as between landlord and tenant have no application where the person who affixes chattels to the soil is himself the owner in fee, and, upon a conveyance by him in fee by way of mortgage, the fixtures, unless expressly excepted, will pass to the mortgagee, and the mortgagor will have no right to remove them as against the mortgagee, whether they have been affixed before (*h*) or after (*i*) the mortgage. What are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it (*k*); and though, if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right, as against the freeholder, to sever the fixtures from the land, yet if he be a mortgagor in fee he has no such right as against his mortgagee (*l*). And the effect of a mortgage by a lessee by way of assignment of the term is the same as regards fixtures, whether affixed before or after the mortgage, as if the mortgagor had been a freeholder and the mortgage a mortgage in fee (*m*). Hence trade fixtures and the right of removing them will pass to the mortgagee (*n*). Trade fixtures will equally pass under

(*f*) *Martin v. Roe*, 1857, 7 E. & B. 244. As to the right of an under-lessee to remove trade fixtures, see *Porter v. Drew*, 1880, 5 C. P. D. 143; *supra*, p. 388.

(*g*) *Gibson v. Hammersmith Ry Co.*, 1862, 2 Dr. & Sm. 603.

(*h*) *Mather v. Fraser*, 1856, 2 K. & J. 536; *Climie v. Wood*, 1868, L. R. 3 Ex. 257, L. R. 4 Ex. 328; *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328.

(*i*) *Wabnsley v. Milne*, 1859, 7 C. B. N. S. 115, p. 138; *Longbottom v. Berry*, 1869, L. R. 5 Q. B. 123.

(*k*) A mortgage of a house "with all fixtures" includes such things as are substantially part of the house, so that they could not be removed without depriving the house of what was intended to be used with it: *Smith v. Maclure*, 1884, 32 W. R. 459. Thus gas fittings and gaseliers, pier-glasses in frames, and cornice-poles were held to be fixtures; but not vallances separate from the cornices or mantel-boards lying unfixed on the mantel-pieces.

(*l*) Per Blackburn, J., in delivering judgment of Exch. Ch. in *Holland v. Hodgson*, *ubi sup.* p. 333.

(*m*) *Meux v. Jacobs*, 1875, L. R. 7 H. L. 481. See *Boyd v. Shorrocks*, 1867, 5 Eq. 72.

(*n*) *Meux v. Jacobs*, *ubi sup.* p. 491. An express power for the mortgagee to sell trade fixtures separately from the land constitutes the

a mortgage by subdemise, but in this case the absolute property in the fixtures as separate chattels with the right to remove and sell them will not pass to the mortgagee unless an intention to that effect is apparent in the deed (o).

Rights of third parties as against mortgagee.

Where machinery or other fixtures are put up by a third party at the order of the mortgagor, under an agreement that such third party shall in certain events have the right to remove them—as where they are put up under a hire and purchase agreement—the third party will be entitled to remove them as against the mortgagee, if they were put up after the mortgage, and while the mortgagor was in possession; for the mortgagee by allowing the mortgagor to remain in possession acquiesces in his making agreements for fixing and removing trade fixtures (p). But where the fixture is put up previously to the mortgage, a mortgagee without notice takes the fixture free from the agreement, unless the agreement has been made in such a way as to run with the land (q).

Right of tenant as against mortgagee.

Upon the same principle, where a mortgagor in possession lets premises to a tenant, the tenant is entitled to remove fixtures as against the mortgagee, even though the tenancy is not binding on the mortgagee (r).

(ii.) *Agricultural Fixtures.*

No relaxation at common law as to agricultural fixtures.

At common law the relaxation in favour of the tenant which has been allowed in the case of trade fixtures is denied to agricultural fixtures, and farm buildings, machinery, &c., erected by agricultural tenants, and affixed to the soil (s), before 24th July, 1851, could not be removed by them (t) unless there was an express agreement to that effect.

mortgage a bill of sale as to those fixtures : *Johns v. Ware*, 1899, 1 Ch. 359.

(o) *Southport Banking Co. v. Thompson*, 1887, 37 Ch. D. 64, explaining *Hawtry v. Butlin*, 1873, L. R. 8 Q. B. 290.

(p) *Gough v. Wood & Co.*, 1894, 1 Q. B. 713. The decision in *Cumberland Banking Co. v. Maryport Iron Co.*, 1892, 1 Ch. 415, can be supported on the same ground.

(q) *Hobson v. Gorringe*, 1897, 1 Ch. 182; *Thomas v. Jennings*, 1896, 45 W. R. 93.

(r) *Sanders v. Davis*, 1885, 15 Q. B. D. 218.

(s) See *supra*, p. 479.

(t) *Elves v. Mau* 1802, 3 East, 38.

Buildings, engines, and machinery erected since that date, with the consent of the landlord in writing, may be removed under 14 & 15 Vict. c. 25 (*u*), s. 3; and further relaxations in favour of the tenant have been introduced by the Agricultural Holdings Act, 1883 (*r*). The former statute enacts (*x*) that if any tenant of a farm after 24th July, 1851, with the consent in writing of the landlord, at his own cost erects any farm building, or puts up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (not erected in pursuance of an obligation in that behalf), such buildings, engines, and machinery are the property of the tenant, and are removable by him, notwithstanding that they are permanently affixed to the soil, provided the land or buildings of the landlord are not injured; but the tenant must give the landlord one month's notice of his intention to remove the fixtures, and the landlord has the option of purchasing them at a valuation.

Statutory relaxations.

By the Agricultural Holdings Act it is provided (*y*) that where, after the 1st of January, 1884, a tenant affixes to his holding (*z*) any engine, machinery, fencing, or other fixture, or erects any building for which he is not under the Act or otherwise entitled to compensation (not affixed or erected in pursuance of an obligation or in substitution for property of the landlord), such fixture or building shall be the property of and removable by the tenant before or within a reasonable time after the termination of the tenancy; but the right of removal is subject to the conditions specified in the section, including the giving to the landlord of one month's notice in writing (*a*), and to the landlord's right to take any

(*u*) Landlord and Tenant Act, 1851.

(*v*) 46 & 47 Vict. c. 61.

(*x*) Sect. 3.

(*y*) Sect. 34.

(*z*) For the holdings to which the Act applies, see *infra*, p. 502.

(*a*) The notice may be in the following form:—

To Mr. E. F.

I hereby give you notice that, under the provisions of the Agricultural Holdings Act, 1883, I intend, after the lapse of one month from your receipt of this notice, to remove from the premises which I now hold of you as tenant, the [*engine and boiler*] erected by me thereon.

Dated the — day of —, 18—.

C. D.

And the landlord's notice of election:—

To Mr. C. D.

Referring to your notice dated the — day of —, 18—, of your

fixture or building, paying the tenant the fair value thereof to an incoming tenant, such value to be settled (without appeal) by a reference under the Act. By sect. 3 (1) of the Market Gardeners' Compensation Act, 1895 (*b*), the above section is extended to every fixture or building affixed or erected by the tenant to or upon a holding to which sect. 3 applies (*c*) for the purpose of his business of a market gardener.

(iii.) *Articles of Ornament and Domestic Utility.*

Matters of
ornament.

The indulgence in favour of the tenant for years has been carried beyond trade fixtures, and he is allowed to remove matters of ornament (*d*). The articles which are mentioned in this connection in the old cases are marble chimney-pieces (*e*), chimney-glasses or pier-glasses (*f*), tapestry or hangings (*g*), and wainscot fixed with screws (*h*). And more recently a cornice has been included (*i*). For an article to fall within the present category it is essential that it should be ornamental (*i*), and a tenant cannot remove a chimney-piece put up by himself which is not ornamental (*k*), even though it is made of marble (*l*). On the other hand, provided it is ornamental, he may remove it though it is not made of marble (*l*).

Articles of
domestic
utility.

A relaxation is also made, however, in favour of articles of domestic utility generally, though it is not easy to reconcile it with the requirement just mentioned that articles

intention to remove the fixtures specified therein from the premises held by you under me, I hereby give you notice that I intend to purchase the said fixtures [*or some of them as enumerated*].

Dated the — day of —, 18—.

E. F.

(*b*) 58 & 59 Vict. c. 27.

(*c*) *Infra*, p. 511.

(*d*) *Elwes v. Maw*, 1802, 3 East, p. 53; *Buckland v. Butterfield*, 1820, 2 Br. & B. p. 58.

(*e*) *Elwes v. Maw*, *ubi sup.*; *Lawton v. Lawton*, 1743, 3 Atk. p. 15; *Lawton v. Salmon*, 1782, 1 H. Bl. 259, note (*a*); *Allen v. Allen*, 1728, Moseley, 112.

(*f*) *Elwes v. Maw*, *supra*; *Beck v. Rebow*, 1706, 1 P. Wms. 94.

(*g*) *Elwes v. Maw*, *supra*; *Squier v. Mayer*, 1701, 2 Eq. Cas. Abr. 430; *Harvey v. Harvey*, 1741, 2 Str. 1141; *Beck v. Rebow*, *supra*. See *Norton v. Dashwood*, 1896, 12 T. L. R. 512.

(*h*) *Elwes v. Maw*, *supra*; *Lawton v. Lawton*, *supra*.

(*i*) *Avery v. Cheslyn*, 1835, 3 A. & E. 75.

(*k*) *Leach v. Thomas*, 1835, 7 C. & P. 327.

(*l*) *Bishop v. Elliott*, 1855, 24 L. J. Ex. 229.

should be of an ornamental character. Thus the tenant may remove such articles as stoves and grates (*m*); beds fastened to the wall or ceiling (*n*); kitchen ranges, ovens, and coppers (*o*); pumps (*p*); bells (*q*); and cupboards (*r*). It has been suggested that this category is restricted to articles which are perfect chattels in themselves (*s*), and at any rate the relaxation does not extend to a building, such as a greenhouse, whether adjoining the dwelling-house (*t*) or erected in the garden (*u*), or to such things as pillars of brick and mortar built on a dairy floor to hold milk-pans (*x*). The tests whether an article falls under the present class seem to be (1) that it is an article of domestic convenience, (2) that it is slightly affixed, and (3) that it can be moved entire (*y*). A ladder and crane fastened to the premises, and put up for the ordinary use and convenience of the premises, have been held not to be removable (*z*).

It is a condition for the removal alike of articles of ornament and articles of domestic convenience, that they can be removed without material injury to the freehold (*a*);

Must be removable without injury to freehold.

(*m*) *Grymes v. Boweren*, 1830, 6 Bing. 437, 439; *R. v. Dunstan*, 1825, 4 B. & C. 686, p. 691; *Ex parte Barclay*, 1855, 5 D. M. & G. p. 410; *R. v. Lee*, 1866, L. R. 1 Q. B. p. 254.

(*n*) *Ex parte Quincy*, 1750, 1 Atk. p. 478.

(*o*) *Grymes v. Boweren*, *supra*; *Lawton v. Lawton*, 1743, 3 Atk. p. 15. See *Winn v. Ingilby*, 1822, 5 B. & A. 625; *Durby v. Harris*, 1841, 1 Q. B. 895.

(*p*) *Grymes v. Boweren*, *supra*.

(*q*) *Lyde v. Russell*, 1830, 1 B. & Ad. 394. See *Pugh v. Arton*, 1869, 8 Eq. p. 629.

(*r*) *R. v. Dunstan*, *supra*; *Ex parte Barclay*, *supra*.

(*s*) *Amos and Ferard on Fixtures*, 3rd ed. p. 117.

(*t*) *Buckland v. Butterfield*, 1820, 2 Br. & B. 54.

(*u*) *Jenkins v. Gething*, 1862, 2 J. & H. 520. A boiler built into the masonry of the greenhouse is irremovable, but the pipes of the heating apparatus, connected with the boiler by screws, are removable: *S. C.*

(*x*) *Leach v. Thomas*, 1835, 7 C. & P. 327. A shed built on brickwork, and posts and rails, have been held to be removable: *Fitzherbert v. Shaw*, 1789, 1 H. Bl. 258, per Gould, J., p. 259; though in *Elwes v. Maw*, 1802, 3 East, p. 55, it is pointed out that in *Fitzherbert v. Shaw* the question did not properly arise.

(*y*) *Grymes v. Boweren*, 1830, 6 Bing. p. 440. The following articles are enumerated in *Amos and Ferard on Fixtures* (3rd ed. p. 411, note (*a*)) as being recognized in practice as removable by the tenant, though there has been no legal decision respecting them: shelves, cabinets, &c., planned and fitted; dressers, presses, bins, fixed cisterns and sinks, iron chests, turret and other clocks, gas fittings and lamps.

(*z*) *Wilde v. Waters*, 1855, 16 C. B. 637.

(*a*) *Avery v. Cheslyn*, 1835, 3 A. & E. 75; *Ex parte Barclay*, 1855, 5 D. M. & G. p. 410. See *R. v. Dunstan*, 1825, 4 B. & C. 686.

though, where fixtures attached to brickwork are removable, the tenant is not bound to restore the brickwork to a perfect state as though the article was still there: it is sufficient to leave it in such a state as would be most useful and beneficial to the lessor or to the next tenant (*b*).

(iv.) *When Fixtures can be Removed.*

Time of removal.

The tenant must remove his fixtures during the continuance of his original term (*c*), or during such further period of possession by him as he holds the premises under a right still to consider himself as tenant (*d*). Other forms in which the rule has been expressed are: "during his term, or during what may for this purpose be considered an excrescence on the term" (*e*); or "during the term, or during such time as he may hold possession after the term in the capacity of a tenant" (*f*). The exact meaning of the extension thus allowed is not clear (*g*), but the right of removal certainly does not last till the tenant has evinced an intention to abandon his claim to the fixtures (*g*), nor, as suggested in *Climie v. Wood* (*h*), is the tenant, as a general rule, allowed a reasonable time after the expiration of the term. Probably a tenant simply holding over on sufferance could not remove fixtures (*i*), though he might if he had reasonable ground for assuming consent by the landlord (*k*), or if his interest was of uncertain duration (*l*).

(*b*) *Foley v. Addenbrooke*, 1844, 13 M. & W. p. 196.

(*c*) *Lyde v. Russell*, 1830, 1 B. & Ad. 394, 395; *Minshall v. Lloyd*, 1837, 2 M. & W. 450. See *Pool's Case*, 1704, 1 Salk. 368. The same rule applies to the removal of fruit trees and bushes by a market gardener under sect. 3 (5) of the Market Gardeners' Compensation Act, 1895 (*supra*, p. 486); but fixtures and buildings are removable under sect. 3 (1) of that Act and sect. 34 of the Agricultural Holdings Act, 1883, before or within a reasonable time after the termination of the tenancy (*supra*, pp. 489, 490).

(*d*) *Wecton v. Woodcock*, 1840, 7 M. & W. 14, 19; *Penton v. Robart*, 1801, 2 East, 88; *Leader v. Homerwood*, 1858, 5 C. B. N. S. 546.

(*e*) *Muckintosh v. Trotter*, 1838, 3 M. & W. p. 186, per Parke, B.

(*f*) *Roffey v. Henderson*, 1851, 17 Q. B. p. 586, per Patteson, J.

(*g*) See *Leader v. Homerwood*, *ubi sup.* p. 553.

(*h*) 1869, L. R. 4 Ex. p. 329.

(*i*) *Leader v. Homerwood*, *supra*. The right of removal does not necessarily continue so long as the tenant remains in possession: *Deeble v. McMullen*, 1857, 8 Ir. C. L. R. 355, p. 365; though the contrary was intimated in *Penton v. Robart*, 1801, 2 East. 88. See *Heap v. Barton*, 1852, 12 C. B. 274; *Cumberland Banking Co. v. Maryport Iron Co.*, 1892, 1 Ch. p. 426.

(*k*) See *Ex parte Brook*, 1878, 10 C. D. p. 109.

(*l*) *Ex parte Brook*, *supra*; *Oakley v. Monck*, 1866, L. R. 1 Ex. p. 164.

He cannot remove them after the landlord, by bringing an action of ejectment, has shown that he has ceased to regard the lessee as his tenant (*m*). If the tenant does not remove the fixtures during the term, or during such additional time as may thus be allowed, the property in them vests finally in the owner of the reversion (*n*).

The rule requiring the tenant to remove the fixtures, if at all, during the term, applies equally whether the term expires by effluxion of time, or by forfeiture (*o*), or by surrender (*p*), save that the tenant cannot by a surrender of the lease defeat the rights of a third party, such as a mortgagee whose security includes the fixtures (*q*). Where a trustee in bankruptcy applies for leave to disclaim, the Court may make such order as it thinks just with respect to fixtures and tenant's improvements (*r*), and ordinarily, it seems, the order will be that the landlord must either take over the fixtures at a valuation, or the trustee must have a reasonable time to sever and remove them (*s*).

Removal on forfeiture or surrender.

Removal by trustee in bankruptcy

The rule is different where the lease itself confers on the tenant the right to remove the fixtures, and then a reasonable time after the expiration of the lease is allowed for their removal (*t*).

Removal under agreement.

A licence by the landlord to take away fixtures, if not under seal, will not be a valid grant of such privilege as against a new tenant in possession not a party to the licence (*u*). So an agreement not under seal under which the fixtures are to be left with a view to their being purchased by the incoming tenant, and otherwise the old tenant is to be at liberty to remove them, does not bind

Licence to remove fixtures.

(*m*) *Barff v. Probyn*, 1895, 11 T. L. R. 467.

(*n*) *Poole's Case*, 1704, 1 Salk. 368; *Meux v. Jacobs*, 1875, L. R. 7 H. L. p. 490.

(*o*) *Pugh v. Arton*, 1869, 8 Eq. 626; *Minshall v. Lloyd*, 1837, 2 M. & W. 450; *Weeton v. Woodcock*, 1840, 7 M. & W. 14.

(*p*) *Ex parte Brook*, 1878, 10 C. D. 100, 110.

(*q*) *London and Westminster Loan Co. v. Drake*, 1859, 28 L. J. C. P. 297; *Saint v. Pilley*, 1875, L. R. 10 Ex. 137.

(*r*) Bankruptcy Act, 1883, s. 55 (3); *supra*, p. 425.

(*s*) *Re Moser*, 1884, 13 Q. B. D. 738.

(*t*) See *Stansfield v. Mayor of Portsmouth*, 1858, 4 C. B. N. S. 120; *Sumner v. Bromilow*, 1865, 34 L. J. Q. B. 130.

(*u*) *Roffey v. Henderson*, 1851, 17 Q. B. 574.

mortgagees without notice, who claim under a deed dated subsequently to the erection of the fixtures (*x*).

A tenant who, upon quitting, leaves fixtures which he would be entitled to remove upon the land, under a parol agreement with the landlord that the latter shall take them at a valuation, can recover their value. The agreement does not relate to an interest in land so as to necessitate its being in writing (*y*).

Effect of new
lease.

It seems that if the tenant takes a new lease commencing from the expiration of the old one, and does not expressly reserve his right to fixtures, the fixtures may pass under the new lease as the landlord's property, free from any right of removal by the tenant (*z*); but the statements to this effect in the judgments in *Ex parte Willoughby D'Eresby* are not to be taken as settling the question (*a*).

(3) TENANT'S RIGHT TO REMOVE FIXTURES UNDER EXPRESS AGREEMENT.

The general rule with respect to annexations to the freehold is always open to variation by agreement of the parties (*b*), and hence the common law rights of a tenant may be either extended or restricted by the terms of the lease; but a lease ought not to be construed so as to take away the ordinary legal rights of the tenant to remove trade or other fixtures, unless such an intention is clearly expressed (*c*). A clause which frequently has the effect of taking away the tenant's rights is the covenant to yield up in repair, and the tenant is by such a covenant precluded from removing any fixtures to which it applies, including fixtures erected for the purposes of trade (*d*).

(*x*) *Thomas v. Jennings*, 1896, 45 W. R. 93.

(*y*) *Hallen v. Runder*, 1834, 1 C. M. & R. 266; *Lee v. Gaskell*, 1876, 1 Q. B. D. 700. See *Lee v. Risdon*, 1816, 7 Taunt. 188. And as to damages for the wrongful removal of fixtures, see *Thompson v. Pettitt*, 1847, 10 Q. B. 101; *McGregor v. High*, 1870, 21 L. T. 803.

(*z*) *Ex parte Willoughby D'Eresby*, 1881, 44 L. T. 781; 2 Sm. L. C. 10th ed. p. 213. See *Thorpe v. Milligan*, 1857, 5 W. R. 337.

(*a*) *Ex parte Willoughby D'Eresby*, 1881, 44 L. T. p. 785.

(*b*) *Wood v. Hewett*, 1846, 8 Q. B. p. 919. Where in ejectionment against the tenant an agreement is made to stay proceedings for a specified period, the tenant's right to remove fixtures seems to be gone: *Fitzherbert v. Shaw*, 1789, 1 H. Bl. 258; *Heap v. Barton*, 1852, 21 L. J. C. P. 153.

(*c*) *D. of Beaufort v. Bates*, 1862, 3 D. F. & J. 381, 390.

(*d*) *Burt v. Haslett*, 1856, 18 C. B. 162, 893.

The following are instances of the application of this principle:—

Construction of particular covenants.

COVENANT *to keep in repair the demised premises and all erections, buildings and improvements erected thereon during the term, and to yield up the same at the end of the term.* The tenant cannot remove a verandah the lower part of which is affixed to the ground by means of posts (e); or the sashes and framework of a greenhouse, the framework being fixed by mortar to walls built to receive it (f).

COVENANT *to yield up in repair at the expiration of the lease all erections and buildings which should be erected and built during the term on the demised premises.* The tenant cannot remove trade buildings if annexed to the freehold (g); though otherwise if they merely rest on blocks or pattens (h). In the latter case they are not erections or buildings within the meaning of the covenant (h).

COVENANT *to leave at the end of the term a water-mill with all fixtures and improvements during the term fixed or set up upon the premises in good condition.* Tenant cannot remove a pair of new millstones set up by him during the term, although under the custom of the country he would have been entitled to do so (i).

COVENANT *to yield up certain scheduled articles, together with all doors, &c. (mentioning a long list of various articles), and other additions, improvements, fixtures and things.* Held, that since the specified articles belonged to no assignable genus, the general words were not restricted by the rule of *ejusdem*

(e) *Penry v. Brown*, 1818, 2 Stark. 403.

(f) *West v. Blakeway*, 1841, 2 M. & Gr. 729, 754. But in both these cases it seems that the tenant would have no right of removal even apart from the covenant.

(g) Though otherwise he would have been entitled to remove them. See *Martyr v. Bradley*, 1832, 9 Bing. p. 29; *Bidder v. Trinidad Petroleum Co.*, 1868, 17 W. R. 153.

(h) *Naylor v. Collinge*, 1817, 1 Taunt. 19. See *supra*, p. 316; and see *Foley v. Addenbrooke*, 1844, 13 M. & W. 174. For a covenant to repair and yield up engines erected for purpose of trade, see *R. v. Topping*, 1825, 1 McClell. & Y. 544.

(i) *Martyr v. Bradley*, 1832, 9 Bing. 24. And so, generally, as to substituted fixtures, where there is a covenant to repair: *Sunderland v. Newton*, 1830, 3 Sim. 450.

generis, and the lessee had no title to tenant's fixtures (*k*).

COVENANT, in a lease of salt works, *to leave the works in good repair at the end of the term*. Prevents the removal of salt-pans placed in frames of brick (*l*). But such a covenant does not embrace articles which are not fixtures (*m*).

Where, however, the reference to fixtures generally is preceded by specific words which comprise landlord's fixtures only, the general words will be restricted accordingly.

COVENANT *to deliver up the demised premises, together with all locks, &c., and other fixtures and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging*. Leaves the tenant at liberty to remove fixtures of the description known as tenant's and trade fixtures (*n*).

Effect of new lease.

If a lessee who has erected trade fixtures takes a new lease with a covenant to repair, he will be bound to repair the fixtures, unless there are strong circumstances to show that they were not intended to pass under the words of the second demise (*o*).

Removal of fixtures during term.

The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not of itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto (*p*).

Reputed ownership.

Trade fixtures are not in the reputed ownership of the lessee, and the lessor may take them under a special agreement, notwithstanding the lessee's bankruptcy (*q*).

(*k*) *Wilson v. Whateley*, 1860, 1 J. & H. 436. For effect of covenant giving the landlord power in certain events to "seize and retain . . . all fixtures whatsoever, whether tenant's or trade fixtures or otherwise," see *Dumerque v. Rumsey*, 1863, 2 H. & C. 777.

(*l*) *E. of Mansfield v. Blackburne*, 1840, 6 Bing. N. C. 426. See *Cosby v. Shaw*, 1887, 23 L. R. Ir. 181.

(*m*) *D. of Beaufort v. Bates*, 1862, 3 D. F. & J. 381.

(*n*) *Bishop v. Elliott*, 1855, 11 Ex. 113, 321. See *Sumner v. Bromilow*, 1865, 34 L. J. Q. B. 130; *Wilde v. Waters*, 1855, 16 C. B. 637; *Dumerque v. Rumsey*, 1863, 2 H. & C. p. 788.

(*o*) *Thresher v. East London Water Works*, 1824, 2 B. & C. 608.

(*p*) *Doe v. Davis*, 1851, 15 Jur. 155.

(*q*) *Clark v. Crownshaw*, 1832, 3 B. & Ad. 804. See *Storer v. Hunter*, 1824, 3 B. & C. 368.

SECT. II.—EMBLEMENTS.

(1) IN WHAT CASES THEY MAY BE CLAIMED.

At common law tenants for will (*r*) or from year to year (*s*), or for other uncertain interests, were, and, except in cases falling within the statute next mentioned, still are, upon the determination of the tenancy, entitled to the benefit of the growing crops, subject to the following conditions:— (1) The tenancy must not be determined by the tenant's own act, as where he surrenders, or where a tenant who holds *durante viduitate* marries (*t*); and for this purpose a determination by forfeiture is deemed to be due to the tenant's own act, although it is the lord who enforces the forfeiture (*u*): (2) the tenant is only entitled to such crops growing upon the land as ordinarily repay the labour by which they are produced in the year in which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period (*x*); thus grain crops (*y*), clover (*z*), hemp, flax (*a*), and potatoes (*b*) may be claimed as emblements; and also hops, since, though the plants are not renewed, so much labour and expense are incurred over the old plants as to make the annual profits a proper recompense for the year's expenditure (*c*); but permanent or natural profits of the earth, such as fruit trees or grass (*d*), do not come within that designation.

A person entitled to emblements may enter upon the lands after the determination of his tenancy for the purpose

(*r*) Litt. s. 68.

(*s*) *Kingsbury v. Collins*, 1827, 4 Bing. p. 207; *Graves v. Weld*, 1833, 5 B. & Ad. p. 114.

(*t*) *Bulwer v. Bulwer*, 1819, 2 B. & A. p. 471; *Oland's Case*, 1602, 5 Rep. 116 a.

(*u*) *Davis v. Eytton*, 1830, 7 Bing. 154. But it seems that an under-lessee takes emblements though the headlease is determined by the act of the lessee: 2 Black. Com. 124; *centrâ*, *Oland's Case*, 1602, 5 Rep. 116 a.

(*x*) *Graves v. Weld*, 1833, 5 B. & Ad. 105, 118.

(*y*) 1 Rol. Abr. 728 (A.), 22.

(*z*) *Graves v. Weld*, *supra*.

(*a*) Co. Litt. 55 b.

(*b*) Judgment of Bayley, J., in *Evans v. Roberts*, 1826, 5 B. & C. p. 832; *Haines v. Welch*, 1868, L. R. 4 C. P. 91.

(*c*) *Graves v. Weld*, 1833, 5 B. & Ad. p. 119; *Latham v. Atwood*, 1636, Cro. Car. 515. In *Kingsbury v. Collins*, 1827, 4 Bing. 202, teasles were allowed to be emblements, but the present point was not raised.

(*d*) 2 Black. Com. 123; Co. Litt. 55 b.

of cutting and carrying away the crops (*e*), for where the law gives anything to any one it gives impliedly whatever is necessary for the taking and enjoying of the same (*f*). The right to emblements passes on the death of the lessee to his executors (*g*); and where the tenant has agreed to share the crop with a third person, such third person is entitled to take the crop as emblements (*h*).

(2) PROVISION AS TO TENANTS OF LANDLORDS ENTITLED
FOR UNCERTAIN INTERESTS.

In the case of tenants whose term is uncertain by reason of its being liable to fall with the estate of a landlord entitled for an uncertain interest, the right to continue the tenancy for the remainder of the current year has been substituted for the right to emblements by 14 & 15 Vict. c. 25, s. 1 (*i*).

SECT. III.—AWAY-GOING CROPS AND COMPENSATION
FOR TILLAGES, ETC.

Tenant right.

In the case of tenancies for a fixed term it is the rule of law that the tenant must, at the end of the term, give up possession of the farm with all crops then growing and the benefit of all improvements which he has made (*k*); but in order to induce the tenant to cultivate the land properly, and especially during the last year of the tenancy, the rule is frequently excluded either by express stipulation (*l*) or by the custom of the country. With respect to away-going crops, such a custom may be either that the outgoing tenant shall be permitted, after he has quitted the farm,

(*e*) Co. Litt. s. 68; *Kingsbury v. Collins*, 1827, 4 Bing. 202. See *Hayling v. Okey*, 1853, 8 Ex. 531, 545.

(*f*) Co. Litt. 56 a.

(*g*) Co. Litt. 55 b.

(*h*) *Kingsbury v. Collins*, 1827, 4 Bing. 202.

(*i*) The Landlord and Tenant Act, 1851. As to the construction of this section, see *Haines v. Welch*, 1868, L. R. 4 C. P. 91.

(*k*) *Caldecott v. Smythies*, 1837, 7 C. & P. 808.

(*l*) Where a lease for twenty-one years gave the lessee a right to compensation "at the end of the term," and there was an option to determine the lease at the end of seven years, the lessee upon determining the lease at the seven years was held to be entitled to compensation: *Bevan v. Chambers*, 1896, 12 T. L. R. 417.

to reap all or part of the crops he has sown (*m*) ; or that he shall receive payment for the crops from the incoming tenant or the landlord. With respect to the management of the farm during the last year, the custom may be that the tenant shall be entitled on quitting to compensation for seeds and tillage and fallows which are not then exhausted (*n*). Where the away-going crops are limited to a specific proportion of the demised land, the tenant sows any excess for the benefit of the landlord or the incoming tenant (*o*) ; unless, indeed, the sowing has been authorized by the landlord (*p*). It is not an unreasonable custom that the tenant, on quitting the farm, should be entitled to charge his landlord with a certain portion of the expense of necessary drainage of the farm done without the landlord's consent or knowledge, such drainage being according to the rules of good husbandry (*q*). The tenant's claim to compensation for tillage is so favourably viewed that where he does the necessary ploughing and sows the land in the ordinary and proper course of husbandry, and leaves manure for the benefit of the landlord, who accepts and uses it, the law, even where there is no custom, will imply an agreement to pay the value (*r*), and the tenant does not lose his right by holding over (*r*).

Where there is a custom of the country regulating any of the above matters, and the lease contains no stipulations which are inconsistent with it, the custom will be considered as engrafted upon the lease, and forming part of it, as fully as if it were expressly stated (*s*). A custom for this purpose is not a custom strictly so called, and need not be immemorial. It is sufficient if it is the usage or general Custom.

(*m*) *Wigglesworth v. Dallison*, 1779, 1 Doug. 201 ; 1 Smith's L. C. 10th ed. p. 528.

(*n*) See *Senior v. Armytage*, 1816, Holt, N. P. 197 ; *Dalby v. Hirst*, 1819, 1 Br. & B. 224 ; *Hutton v. Warren*, 1836, 1 M. & W. 466. As to express agreements with respect to tillages and improvements, see *Whittaker v. Barker*, 1832, 1 Cr. & M. 113 ; *Newson v. Smythies*, 1858, 3 H. & N. 840 ; *Brocklington v. Saunders*, 1864, 13 W. R. 46.

(*o*) *Caldecott v. Smythies*, 1837, 7 C. & P. 808.

(*p*) *Griffiths v. Tombs*, 1833, 7 C. & P. 810.

(*q*) *Mousley v. Ludlam*, 1851, 21 L. J. Q. B. 64.

(*r*) *Martin v. Coulman*, 1834, 4 L. J. K. B. 37.

(*s*) *Hutton v. Warren*, 1836, 1 M. & W. 466 ; *Wigglesworth v. Dallison*, 1779, 1 Doug. 201 ; 1 Sm. L. C. 10th ed. p. 528.

practice of the neighbourhood (*t*) ; but the practice of a particular estate is not supposed to be matter of notoriety, and has not the same effect (*u*).

Exclusion of custom.

It was said in *Senior v. Armytage* (*x*) that the custom was operative provided the written agreement did not in express terms exclude it ; but the custom may be also excluded by implication, and for this purpose it is sufficient if there is any term of the lease necessarily repugnant to or inconsistent with the custom (*y*). Thus a custom for the tenant to have the away-going crops is excluded if the lease expressly makes other provision in respect of such crops (*z*) ; and it is equally excluded if the tenant holds after the expiration of the lease as yearly tenant without coming to a fresh agreement (*z*).

But a stipulation giving compensation for certain matters does not exclude a custom giving compensation for matters substantially different (*a*) ; and a stipulation as to deductions of one kind from the value of the away-going crop does not exclude a custom as to deductions of another kind (*b*). If the lease contains no stipulations as to the mode of quitting, the outgoing tenant is entitled to his away-going crop according to the custom of the country, although the terms of *holding* may be inconsistent with such a custom (*c*).

Possession for purpose of away-going crops.

It has been said that the tenancy still continues as to the land on which the away-going crop is growing (*d*) ; or that the outgoing tenant remains in possession until all is done which he has a right to do in respect of the crop (*e*). But where the tenant is to leave the crop to the landlord or the incoming tenant at a valuation, he has no right of

(*t*) *Dalby v. Hirst*, 1819, 1 Br. & B. 224, pp. 228, 230.

(*u*) *Womersley v. Dalby*, 1857, 26 L. J. Ex. 219.

(*x*) 1816, Holt, N. P. 197.

(*y*) *Holding v. Pigott*, 1831, 7 Bing. 465, p. 474.

(*z*) *Boraston v. Green*, 1812, 16 East, 71. See *Webb v. Plumer*, 1819, 2 B. & A. 746 ; *Roberts v. Barker*, 1833, 1 Cr. & M. 808 ; *Clarke v. Roystone*, 1845, 13 M. & W. 752 ; *Clarke v. Westrope*, 1856, 18 C. B. 765.

(*a*) *Hutton v. Warren*, 1836, 1 M. & W. 466.

(*b*) *Re Constable and Cranswick's Arbitration*, 1899, 80 L. T. 164.

(*c*) *Holding v. Pigott*, *supra*. See *Muncey v. Dennis*, 1856, 1 H. & N. 216.

(*d*) *Boraston v. Green*, 1812, 16 East, p. 81.

(*e*) *Griffiths v. Puleston*, 1844, 13 M. & W. p. 360. See *Beavan v. Delahay*, 1788, 1 H. Bl. 5 ; *Re Powers*, 1890, 63 L. T. 626. So by special stipulation the lessor or the incoming tenant may have the right to enter and plough before the termination of the notice to quit : *Milner v. Jordan*, 1846, 8 Q. B. 615. See *Petrie v. Daniel*, 1 Smith, 199.

possession so as to exclude the landlord, but at most a right to go on the land for the purposes of the crop until the valuation is made (*f*).

Tenant right only arises at the expiration of the lease and on the substantial performance of the covenants, and upon abandoning his tenancy during the term the tenant forfeits his tenant right (*g*). He will also forfeit it by accepting a new tenant right under a fresh lease, but not by taking a new lease which is silent about compensation (*h*).

Incidents of
tenant right.

Tenant right is assignable, and passes under an assignment of "all the estate and interest" of the outgoing tenant in the farm (*i*). And an agreement by the tenant to pay interest on a valuation at entry, and to leave an equal valuation on quitting, enures for the benefit of the landlord for the time being (*k*). An action to recover compensation for tenant right enforces an "obligation affecting land" within R. S. C., Ord. 16, r. 1 (*k*), and an order can be made for service of the writ out of the jurisdiction (*l*).

Primâ facie the landlord is bound to pay the outgoing tenant for tillages, and the incoming tenant does not render himself liable to do so by the mere fact of entering upon the land, unless a new contract has been entered into with him (*m*). Where there is a custom that the incoming tenant shall pay for the fallows, and shall be repaid upon his leaving the premises, there is an implied contract on the part of the landlord that if there be no incoming tenant the landlord will pay the outgoing tenant according to the custom (*n*). And, generally, where there is no incoming tenant any payment due by custom to the outgoing tenant must be borne by the landlord (*n*). Valuation is not a

Compensation
—by whom
payable.

(*f*) *Strickland v. Maxwell*, 1834, 2 Cr. & M. 539. As to the effect of onstand for manure, see *Beuty v. Gibbons*, 16 East, 116.

(*g*) *England v. Shearburn*, 1884, 52 L. T. 22. See *Thorpe v. Eyre*, 1834, 1 A. & E. 926. As to observance of covenants being under the terms of the lease a condition precedent to the enjoyment of outgoing rights, see *Strickland v. Maxwell*, 1834, 2 Cr. & M. 539.

(*h*) *Lane v. Moeder*, 1885, C. & E. 548.

(*i*) *Cary v. Cary*, 1862, 10 W. R. 669.

(*k*) *Wagstaff v. Clinton*, 1883, C. & E. 45.

(*l*) *Kaye v. Sutherland*, 1887, 20 Q. B. D. 147.

(*m*) *Codd v. Brown*, 1867, 15 L. T. 536; *Sucksmith v. Wilson*, 1866, 4 F. & F. 1083.

(*n*) *Fariell v. Gaskoin*, 1852, 7 Ex. 273. See *Stafford v. Gardner*, 1872, L. R. 7 C. P. 242. And a custom throwing liability on the incoming tenant is bad: *Bradburn v. Foley*, 1878, 3 C. P. D. 129.

condition precedent to payment, unless made so by the terms of the lease, and the tenant can recover against the landlord on a *quantum meruit* (*o*).

SECT. IV.—STATUTORY COMPENSATION FOR IMPROVEMENTS.

(1) THE AGRICULTURAL HOLDINGS ACT, 1883 (*p*).

Right to compensation.

Subject to the conditions prescribed by the Agricultural Holdings Act, 1883 (*q*), a tenant (*r*) who has made on his holding any of the improvements subsequently mentioned is entitled, on quitting his holding at the determination of a tenancy, to obtain from the landlord, as compensation under the Act, such sum as fairly represents the value of the improvement to an incoming tenant (*s*).

Holdings to which Act applies.

The Act applies only to holdings which are either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden; and a holding, although satisfying any of these conditions, is excluded if let to the tenant during his continuance in any office, appointment, or employment held under the landlord (*t*).

Schedule of improvements.

The list of improvements (*u*) to which the Act applies is divided into three parts according as the claim to compensation depends: (1) on the previous consent of the landlord;

(*o*) *Sucksmith v. Wilson*, 1866, 4 F. & F. 1083; *Clarke v. Westrope*, 1856, 18 C. B. 765.

(*p*) This repeals by sect. 62 the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), except as to rights already acquired, or as to improvements under the Act by tenants holding under tenancies current on 1st January, 1884. As to recovery of compensation given by that Act, see *Smith v. Acock*, 1884, 28 Sol. Journ. 740 (Northleach County Court).

(*q*) 46 & 47 Vict. c. 61. The Act came into force on 1st January, 1884: sect. 53.

(*r*) *I.e.* the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year: sect. 61. There may be a tenancy from year to year within this definition, although the tenancy is determinable on three months' notice at any time of the year: *King v. Eversfield*, 1897, 2 Q. B. 475.

(*s*) Sect. 1. As to tenancies current at the commencement of the Act, see sects. 5, 61; *Smith v. Acock*, 1885, 53 L. T. 230.

(*t*) Sect. 54. Where land held with a cottage has been cultivated with a plough, it has been held that the Act applies, and a year's notice to quit is necessary: *Godfrey v. Jacobs*, 1886, 30 Sol. Journ. 539 (March County Court). But where a shop and grass land are let together the tenancy is not wholly pastoral, and is not within the Act: *Morley v. Jones*, 1888, 32 Sol. Journ. 630 (Gainsborough County Court).

(*u*) Sched. I.

(2) on previous notice to the landlord ; or (3) is free from such condition (*x*).

PART I.

Improvements to which the consent of the landlord is required. — (1) Erection or enlargement of buildings ; (2) formation of silos ; (3) laying down of permanent pasture ; (4) making and planting of osier-beds ; (5) making of water meadows or works of irrigation ; (6) making of gardens ; (7) making or improving of roads or bridges ; (8) making or improvement of watercourses, ponds, wells, or reservoirs, or of works for the application of water-power or for supply of water for agricultural or domestic purposes ; (9) making of fences ; (10) planting of hops ; (11) planting of orchards or fruit bushes ; (12) reclaiming of waste land ; (13) warping of land (*y*) ; (14) embankment and sluices against floods.

PART II.

Improvement in respect of which notice to the landlord is required.—(15) Drainage.

PART III.

Improvements to which consent of landlord is not required, nor need previous notice be given.—(16) Boning of land with undissolved bones ; (17) chalking of land ; (18) clay-burning ; (19) claying of land ; (20) liming of land ; (21) marling of land ; (22) application to land of purchased artificial or other purchased manure (*z*) ; (23) consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

(*x*) In the case of market gardens improvements (1), (6), and (11) are to be treated as not comprised in this schedule, and the following improvements are to be treated as comprised in Part III. of the schedule: (i.) planting of standard or other fruit trees permanently set out ; (ii.) planting of fruit bushes permanently set out ; (iii.) planting of strawberry plants ; (iv.) planting of asparagus and other vegetable crops ; (v.) erection or enlargement of buildings for the purposes of the trade or business of a market gardener. Compensation can be obtained for these improvements without previous consent or notice : Market Gardeners' Compensation Act, 1895, s. 3 (2), (3). See *infra*, p. 511.

(*y*) " This is a mode of fertilizing land by means of the warp or deposit of mud let in upon it by the action of tidal rivers through artificial banks and channels : " Lely and Pearce, *Agricultural Holdings*, 2nd ed. p. 150.

(*z*) See *Brunskill v. Atkinson*, 1884, 29 Sol. Journ. 29 (Kendal County Court).

Compensation
under Part I.

Compensation in respect of any improvement mentioned in Part I. of the above list is not payable unless the landlord, or his agent duly authorized in that behalf, has, previously to the execution of the improvement, consented in writing to the making of such improvement (*a*). Any such consent may be given unconditionally, or upon such terms, as to compensation or otherwise, as may be agreed upon between the landlord and the tenant; and in the event of any such agreement being made, any compensation payable thereunder is to be deemed to be substituted for the compensation under the Act (*b*).

Compensation
under Part II.

Compensation is not payable in respect of any improvement mentioned in Part II.—*i.e.* drainage—unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorized in that behalf, notice in writing (*c*) of his intention so to do, and of the manner in which he proposes to do the intended work. Upon such notice being given, one of three courses can be adopted: (1) the landlord and the tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and any compensation payable under such an agreement is to be deemed to be substituted for compensation under the Act; or (2) the landlord may, unless the notice of the tenant is previously withdrawn,

(*a*) The consent may be in the following form:—

To Mr. C. D.

I do hereby consent to the execution by you, at your own cost and expense, of the following improvements upon the premises now held by you as my tenant:—

Erection of [*buildings as specified, or execution of other improvements mentioned in Part I.*]

Dated the — day of —, 18—.

E. F.

(*b*) Sect. 3. This and the next section apply only to improvements executed after the commencement of the Act. Compensation for improvements executed before that date is governed by sect. 2.

(*c*) As to service of notices, &c., under the Act, see sect. 28. Notice to an agent is *primâ facie* sufficient: *Ingham v. Fenton*, 1893, 10 T. L. R. 113. The notice may be as follows:—

To Mr. E. F.

I hereby give you notice that I intend, after the lapse of two months from your receipt of this notice, to execute the following drainage works [*describe the proposed works in detail*]; and I propose to execute the said works in the following manner [*describe in detail the manner*].

Dated the — day of —, 18—.

C. D.

undertake to execute, and may execute, the improvement himself in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding 5*l.* per cent. per annum on the outlay, or not exceeding such annual sum, payable for a period of twenty-five years, as will repay the outlay in that period with interest at 3*l.* per cent. per annum, such annual sum to be recoverable as rent; or (3) in default of such agreement or undertaking, or in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and will then be entitled to compensation under the Act (*d*). The landlord and the tenant may dispense with notice under the section, and may agree in the lease or otherwise in the same manner and as validly as if notice had been given (*d*).

Apart from agreements providing substituted compensation as above, any agreement made by a tenant by virtue whereof he is deprived of his right to compensation under the Act is void so far as it deprives him of such right (*e*).

Agreements in bar of compensation void.

A tenant is not entitled to claim compensation by custom, or otherwise than in manner authorized by the Act, in respect of any improvement for which he is entitled to compensation under the Act; but where he is not entitled to compensation under the Act, he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if the Act had not passed (*f*); and, subject to the express provisions of the Act, there is a general saving of all rights both of landlords and tenants, including rights in respect of emblements, tillages, away-going crops, and fixtures (*g*).

Compensation under the Act is exclusive.

The right of a tenant who continues in his holding to obtain compensation on quitting is not affected by any change of the tenancy, as by renewal of his lease, which may take place (*h*); and an incoming tenant who, with the consent

Changes of tenancy.

(*d*) Sect. 4.

(*e*) Sect. 55.

(*f*) Sect. 57. "Tenant" means a tenant claiming compensation under the Act. The section does not prevent the tenant from claiming compensation under an express agreement. It only requires that claims under the Act shall be made in accordance with its provisions. The Act does not prevent persons contracting themselves out of it: *Newby v. Eckersley*, 1899, 1 Q. B. 465; 47 W. R. 245; *Re Pearson and PAnson*, 1899, 68 L. J. Q. B. 878.

(*g*) Sect. 60.

(*h*) Sect. 58.

in writing of his landlord (*i*), pays compensation under the Act to the outgoing tenant, is entitled on quitting to compensation as though he had held during both tenancies (*k*).

Improve-
ments made
in last year
of tenancy.

Tenants holding from year to year, and tenants for a term of years during the last year of the term, are subject to an important restriction in respect of compensation for improvements other than manures (*l*)—that is, Nos. 22 and 23 in the above list (*m*). A tenant from year to year has no claim to compensation under the Act for improvements begun by him within one year before he quits his holding, or at any time after he has given or received final notice to quit; and a lessee for years has no claim for improvements begun within one year before the expiration of the lease. A final notice to quit means a notice which has not been waived or withdrawn, but has resulted in the tenant quitting his holding. But the restriction does not apply where a tenant from year to year has begun the improvement during the last year of his tenancy, and then receives notice to quit, in pursuance of which he quits at the end of that year; or where a tenant, whether from year to year or as lessee, previously to beginning the improvement has served notice of his intention on the landlord, and the landlord has either assented or has failed for a month after the receipt of the notice to object to the making of the improvement (*n*).

Estimating
value of im-
provements.

In estimating the value of any improvement in the First Schedule, any result which is justly due to the inherent capabilities of the soil is not to be taken into account (*o*); and the amount of the compensation is to be reduced by the following items:—(a) Any benefit allowed by the landlord in consideration of the tenant executing the improvement; (b) in case of compensation for manures (*p*) the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or

(*i*) In the case of market gardens this section is to be read as if the words “with the consent in writing of his landlord” were not included therein: Market Gardeners’ Compensation Act, 1895, s. 3 (4). *Idem* *infra*, p. 511.

(*k*) Sect. 56.

(*l*) Sect. 59.

(*m*) Sect. 61.

(*n*) Sect. 59.

(*o*) Sect. 1.

(*p*) Sect. 61; *supra*, p. 503.

green crops removed within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made; and (c) any sums due to the landlord in respect of rent, waste, breach of covenant, and rates and taxes (*q*). And the amount is to be increased by any sum due to the tenant in respect of breach of covenant on the part of the landlord (*r*). But the landlord is not to obtain under the Act compensation in respect of waste or breach of covenant by the tenant, committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy (*r*).

When a tenant wishes to claim compensation, he must, two months at least before the determination of the tenancy (*s*), give notice in writing to the landlord (*t*) of his intention to make the claim (*u*); and the landlord may thereupon, before the determination of the tenancy or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or breach of covenant or other agreement. The notice and counter-notice must state, as far

Notice of
intended
claim.

(*q*) In an arbitration under the Act, where a greater amount is awarded to the landlord in respect of waste and breaches of covenant committed by the tenant than is awarded to the tenant as compensation for improvements, the landlord cannot recover the balance under the procedure given by the Act: *Re Holmes and Formby*, 1895, 1 Q. B. 174. But where the arbitration is by agreement outside the Act, the award may be enforced under sect. 12 of the Arbitration Act, 1889. *Re Lloyd and Tooth*, 1899, 1 Q. B. 559. The landlord cannot make an independent claim under the Act; he can only counterclaim in answer to the tenant's claim: *Re Holmes and Formby*. (*r*) Sect. 6.

(*s*) Where the tenant is entitled, under the custom of the country, to hold over a portion of the land for a definite period after the expiration of his notice to quit, the "determination of the tenancy" takes place when the holding under the custom ends, and it is sufficient if the notice is given two months before that time: *Re Paul*, 1889, 24 Q. B. D. 247. But it is otherwise if he only holds over buildings, as these do not constitute an "agricultural holding," and the notice is bad unless given two months before the land is given up: *Morley v. Carter*, 1898, 1 Q. B. 8. See *Black v. Clay*, 1894, A. C. 368.

(*t*) The landlord's agent is *prima facie* authorized to receive such a notice, and, unless it is shown that his authority was qualified, the notice is sufficient if sent to him: *Ingham v. Fenton*, 1883, 10 T. L. R. 113.

(*u*) The notice may be in the following form:—
To Mr. E. F.

I hereby give you notice that upon the determination of my tenancy under you of the premises at [*describing them*], on the — day of —

as reasonably may be, the particulars and amount of the intended claim (x).

Settlement of compensation.

The landlord and tenant may agree on the amount and mode and time of payment of compensation to be paid under the Act; and in case they do not so agree the difference is settled by a reference (y).

Reference.

A reference under the Act is to a single referee, if the parties concur in a joint appointment; otherwise, to two referees, one appointed by each party, or, on default of either party, by the county court, and an umpire to be appointed by the referees before entering on the reference, or, in the case of the referees failing to appoint for seven days after request from either party, by the county court (z).

next, I intend to claim compensation under the Agricultural Holdings Act, 1883, as follows :—

- 1. Erection of [describe nature and situation of buildings] £ s. d.
in accordance with your consent in writing dated the
— day of —, 18— - - -
- 2. Draining [describe land drained] in manner specified in
my notice to you dated the — day of —, 18— . - - -
- 3. Application to [describe fields] of — tons of nitrate of soda
in or about the month of —, 18— - - -

Dated the — day of —, 18—. C. D.

And the counter-notice as follows :—

To Mr. C. D.

Referring to your claim dated the — day of —, 18—, for compensation under the Agricultural Holdings Act, 1883, I hereby give you notice that I intend to claim against you as follows :—

- To removing from the demised premises in or about the £ s. d.
month of —, 18—, — of hay in breach of covenant
contained in your lease - - -

Dated this — day of —, 18—. E. F.

(x) Sect. 7.

(y) Sect. 8. Such reference is the only way of adjudicating on a disputed claim. It cannot form the subject-matter of a counter-claim in an action for rent brought by the landlord in the High Court : *Gaslight and Coke Co. v. Holloway*, 1885, 52 L. T. 434 ; *Schofield v. Hincks*, 1888, 58 L. J. Q. B. 147. But the parties cannot by agreement confer upon the county court jurisdiction to make an order for enforcing compensation for matters not within the Act, and the landlord is entitled to a prohibition to prevent the county court from proceeding upon such an order : *Farquharson v. Morgan*, 1894, 1 Q. B. 552. On the other hand, if the reference is in fact outside the Act altogether, it is not avoided for non-compliance with the statutory procedure by reason of the award including some matters which are within the Act : *Shrubb v. Lee*, 1888, 59 L. T. 376.

(z) Sect. 9. See further, as to appointment of referee, sects. 10, 11, and *Re Griffiths and Morris*, 1895, 72 L. T. 290 ; as to the reference,

Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise is not paid within fourteen days after the due time, it is recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable (*a*); or it may be set off against rent, and the landlord can only distrain for the balance (*b*). But the landlord may obtain from the county court a charge for the amount on the holding (*c*), and where the landlord is a trustee, he is not liable personally, and the amount can only be recovered by way of charge on the holding (*d*).

Recovery of compensation.

A landlord—*i.e.* the person entitled for the time being to receive the rents and profits of the holding (*e*), whatever may be his estate or interest in the holding—has, for the purposes of the Act, the powers of an owner in fee (*f*). The designations of “landlord” and “tenant” continue to apply to the parties until the conclusion of any proceedings under the Act in respect of compensation (*e*), and hence the term “landlord” includes the executors of the landlord (*g*).

Persons within Act.

Under the Local Government Act, 1894 (*h*), a parish council has power to hire land for allotments, and such hiring may, under the authority of the county council, be compulsory (*i*). On the determination of any tenancy created by compulsory hiring, a single arbitrator is to have power to determine as to the amount due by the landlord

Land hired by parish council for allotments.

sects. 12—19 : costs, sects. 20, 27 ; *Re Griffiths and Morris, supra* : time for payment of compensation, sect. 21 : appeal, sects. 22, 23 ; *Smith v. Acock*, 1884, 28 Sol. Journ. 740 (Northleach County Court); *Brunskill v. Atkinson*, 1884, 29 Sol. Journ. 29 (Kendal County Court). The appeal should be by motion : *Kirkheaton Board v. Ainley, Sons & Co.*, 1892, 2 Q. B. 274 ; County Courts Act, 1888, ss. 120, 124 ; R. S. C. 1883, Ord. 59, rr. 9, 10. See as to married women, infants, and lunatics, sects. 25, 26.

(*a*) Sect. 24.

(*b*) Sect. 47.

(*c*) Sects. 29, 30, 32. The charge is a land charge within the meaning of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), and must be registered accordingly. See sect. 4 of that Act.

(*d*) Sect. 31. This charge must be registered as mentioned in the preceding note. See Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 3.

(*e*) Sect. 61.

(*f*) Sect. 42.

(*g*) *Gough v. Gough*, 1891, 2 Q. B. 665.

(*h*) 56 & 57 Vict. c. 73.

(*i*) Sect. 10 (1).

for compensation for improvements, or by the parish council for depreciation; but such compensation is to be assessed in accordance with the provisions of the Agricultural Holdings Act, 1883 (*k*). The arbitrator is to be appointed in accordance with the provisions of sect. 3 (*l*) of the Allotments Act, 1887 (*m*)—that is, by the parties if they agree; if not, by the Local Government Board.

(2) THE ALLOTMENTS AND COTTAGE GARDENS COMPENSATION FOR CROPS ACT, 1887.

Compensation
to tenants of
allotments.

50 & 51 Vict.
c. 26.

This Act applies to allotments of not more than two acres in extent held under a landlord, and cultivated as a garden or as a farm, or partly as a garden and partly as a farm, and also to cottage gardens (*n*). The term “holding” in the Act means an allotment or cottage garden (*o*). Upon the determination of the tenancy of a holding (*p*), the tenant (*q*) is entitled, notwithstanding any agreement to the contrary, to obtain from the landlord compensation in money (1) for crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes planted by him with the previous consent in writing of the landlord; (2) for manure under the circumstances specified in the Act; and (3) for drains and outbuildings, &c., made with the written consent of the landlord (*r*). Any difference as to the amount and time of payment of compensation is settled by arbitration (*s*), and the award is final in every case (*t*). The amount of the compensation can be recovered under an order made by the county court (*u*). A claim under the Act excludes any claim under the Agricultural Holdings Act, 1883 (*x*).

(*k*) 56 & 57 Vict. c. 73, s. 10 (7).

(*l*) See sub-sect. (4).

(*m*) 50 & 51 Vict. c. 48.

(*n*) A cottage garden is an allotment attached to a cottage: sect. 4.

(*o*) Sect. 4.

(*p*) By effluxion of time or any other cause: sect. 4. As to compensation to the tenant of an allotment under the Allotments Act, 1887, whose tenancy is determined under sect. 8 of the Act, see that section.

(*q*) Or his legal personal representatives: sect. 4.

(*r*) Sect. 5.

(*s*) Sects. 7—15. As to deductions from the compensation, see sect. 6.

(*t*) Sect. 16.

(*u*) Sect. 17.

(*x*) Sect. 18.

The Act only applies to poor persons who cultivate their gardens for food or pleasure; hence it does not apply to a seedsman using land for the purposes of his business (*y*).

(3) THE TENANTS' COMPENSATION ACT, 1890.

Where land which is mortgaged is in the occupation of a tenant whose contract of tenancy is not binding on the mortgagee, the tenant may have no right to compensation for improvements under the Agricultural Holdings Act, 1883 (*z*), or the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (*a*). The hardship which may thus arise is provided against by the Tenants' Compensation Act, 1890 (*b*), under which the tenant is, as against the mortgagee taking possession, entitled to the compensation which under the above Acts or the custom of the country, or agreements sanctioned by the above Acts, he could claim from the mortgagor; but the compensation can only be recovered by set-off against rent or other sum due from the tenant, or by charge on the land. The tenant is also protected from being evicted without compensation.

Compensation
as against
mortgagee.

(4) THE MARKET GARDENERS' COMPENSATION ACT, 1895.

The special provisions of the Market Gardeners' Compensation Act, 1895 (*c*), with respect to the removal of fixtures (*d*), compensation for improvements (*e*), and the removal of fruit trees (*f*), have been already noticed. These provisions apply to any holding with respect to which it is agreed in writing after 1st January, 1896, that the holding shall be let or treated as a market garden (*g*). With

Market
gardens.

(*y*) *Cooper v. Pearse*, 1896, 44 W. R. 494.

(*z*) 46 & 47 Vict. c. 61.

(*a*) 50 & 51 Vict. c. 26.

(*b*) 53 & 54 Vict. c. 57.

(*c*) 58 & 59 Vict. c. 27. By sect. 1 the Act is to be construed as part of the Agricultural Holdings Act, 1883.

(*d*) *Supra*, p. 490.

(*e*) *Supra*, p. 503.

(*f*) *Supra*, p. 486.

(*g*) Sect. 3. A market garden is defined by sect. 6 as a holding cultivated for the purpose of the business of market gardening, a definition which seems sufficiently obvious.

respect to tenancies current on such date it is provided as follows:—

Tenancies
current,
1 Jan. 1896.
58 & 59 Vict.
c. 27, s. 4.

Where under a contract of tenancy current at the commencement of the Act (*h*) a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvements in respect of which a right of compensation or removal is given to a tenant by the Act, then the provisions of the Act shall apply in respect of such holding, as if it had been agreed in writing after the commencement of the Act that the holding should be let or treated as a market garden.

A contract of tenancy to be within this section must be at least for a yearly tenancy (*k*), but it is not the less a yearly tenancy that three months' notice to quit may be given expiring at any time of the year (*l*).

SECT. V.—DELIVERY OF POSSESSION.

(1) TENANT'S OBLIGATION TO GIVE POSSESSION.

Damages for
non-delivery
of possession.

Upon the demise of a house or premises there is implied an undertaking by the tenant that he will deliver up possession to the landlord at the expiration of the term (*m*). If the premises are then in the occupation of an undertenant, the landlord may refuse to accept the possession (*n*), and may recover from the original tenant rent for the period after the expiration of the term during which the undertenant remains in possession (*o*), and also the costs of an action of ejectment brought against such undertenant in order to obtain possession (*p*). He may recover also the reasonable damages and costs sustained by him in an

(*h*) *I.e.* 1st January, 1896 : sect. 2. (*k*) *Supra*, p. 502, note (*r*).

(*l*) *King v. Eversfield*, 1897, 2 Q. B. 475.

(*m*) *Henderson v. Squire*, 1869, L. R. 4 Q. B. 170, 173; *Harding v. Crethorne*, 1793, 1 Esp. 57. See *Hey v. Moorhouse*, 1839, 6 Bing. N. C. 52; *Outram v. Maude*, 1881, 17 C. D. p. 404.

(*n*) Per Lord Kenyon, C.J., in *Harding v. Crethorne*, *supra*.

(*o*) *IBBS v. Richardson*, 1839, 9 A. & E. 849. Cf. *Levy v. Lewis*, 1861, 9 C. B. N. S. 872. As to the recovery of articles wrongfully removed during the tenancy, see *Petre v. Ferrers*, 1891, 61 L. J. Q. B. 426.

(*p*) *Henderson v. Squire*, *supra*.

action at the suit of a person to whom he had contracted to let the land, but to whom he cannot deliver possession by reason of the tenant's wrongful holding over (*q*). On breach of a covenant to deliver up possession, the sum to be recovered is not the value of the land, but the real damage sustained by the landlord, which may be considerable or only nominal (*r*).

Where premises are let to two persons for a term of years, and at the end of such term one of them holds over with the assent of the other, both will be liable for the time during which the one holds over (*s*). But one tenant cannot bind his co-tenant by holding over without his assent (*t*).

In addition to the land originally demised, the landlord is entitled at the determination of the tenancy to recover from the tenant any land which the tenant may have added to it by encroachment on adjoining land, such encroachment being deemed to be made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord; unless it is made under circumstances showing an intention to hold it for his own benefit alone, and not as part of his holding under the landlord (*u*). The rule applies although the land belongs to the landlord and has been taken in with his assent (*x*), but if he expressly refuses assent, the tenant incloses for his own benefit (*y*). And the tenant retains the benefit of an inclosure made prior to the lease (*z*).

Encroach-
ments.

The rule applies also where the encroachment is at a distance from the demised premises, provided the distance is not so great that the tenant must be presumed to have

(*q*) *Bramley v. Chesterton*, 1857, 2 C. B. N. S. 592.

(*r*) *Watson v. Lane*, 1856, 11 Ex. p. 774.

(*s*) *Christy v. Tancred*, 1842, 9 M. & W. 438. See 7 M. & W. 127; *Tancred v. Christy*, 1843, 12 M. & W. 316.

(*t*) *Draper v. Crofts*, 1846, 15 M. & W. 166.

(*u*) Per Willes, J., in *Whitmore v. Humphries*, 1871, L. R. 7 C. P. 1, 4; *Att.-Gen. v. Tomline*, 1880, 15 Ch. D. p. 160; *Doe v. Rees*, 1834, 6 C. & P. p. 610; *Doe v. Tidbury*, 1854, 14 C. B. p. 325; *Doe v. Mulliner*, 1795, 1 Esp. 460; *Andrews v. Hailes*, 1853, 2 E. & B. p. 353; *Kingsmill v. Millard*, 1855, 11 Ex. pp. 315, 318; *Doe v. Williams*, 1836, 7 C. & P. 332. But it has been held that the rule applies only to inclosures of waste land: *Lord Hastings v. Saddler*, 1898, 79 L. T. 355.

(*x*) *Whitmore v. Humphries*, *supra*.

(*y*) *Doe v. Massey*, 1851, 17 Q. B. 373.

(*z*) *Dixon v. Buty*, 1866, L. R. 1 Ex. 259.

taken in the land for his own benefit (*a*). It is not necessary, it has been said, that the encroachment should be conterminous with the holding. It is enough if it is so near that by reason of its nearness the tenant gained the opportunity of making it, and the landlord might have tacitly acquiesced in it (*b*). But the encroachment is severed from the holding if it is conveyed to a third person and the conveyance is communicated to the landlord, and it need not then be delivered up at the end of the term (*c*). The landlord cannot sue during the term in respect of an encroachment on his own land of which the tenant has had possession for more than twelve years (*d*).

(2) LANDLORD'S REMEDIES FOR RECOVERING POSSESSION.

(i) *Indirect.*

In certain cases of holding over by the tenant a liability is imposed on him by statute to pay either double the annual value of the premises or double the rent: the former when the tenant holds over after the determination of the term, knowing that he has no right to do so; the second when a tenant holds over after the expiration of a notice to quit given by himself.

Action for double value.
4 Geo. 2, c. 28 (*dd*), s. 1.
Tenant holding over after determination of tenancy and notice in writing given by landlord, to pay double value.

In case any tenant for any term for life or years, or other person who shall come into possession of any lands, tenements or hereditaments under, or by collusion with, such tenant, shall wilfully hold over any lands, tenements or hereditaments after the determination of such term and after demand made and notice in writing given for delivering the possession thereof, by his landlord, or the person to whom the remainder or reversion of such lands, &c., shall belong, or his agent thereunto lawfully authorized (*e*), such

(*a*) *Kingsmill v. Millard*, 1855, 11 Ex. 313.

(*b*) Per Willes, J., in *E. of Lisburne v. Davies*, 1866, L. R. 1 C. P. p. 268, where the intervention of a river and a strip of waste land was held not to rebut the ordinary presumption; and the result was the same in *Andrews v. Hailes*, 1853, 2 E. & B. 349, where a road intervened.

(*c*) *Kingsmill v. Millard*, 1855, 11 Ex. p. 318. See *Doe v. Jones*, 1846, 15 M. & W. 580. (*d*) *Tabor v. Godfrey*, 1895, 64 L. J. Q. B. 245.

(*dd*) The Landlord and Tenant Act, 1730.

(*e*) The notice can be given by a receiver appointed by the Court: *Wilkinson v. Colley*, 1771, 5 Burr. 2694; or by a receiver appointed under a mortgage deed with power to give notice to quit: *Poole v. Warren*, 1838, 8 A. & E. 582.

person so holding over shall, during the time he shall so hold over, or keep the person entitled out of possession of the said lands, &c., as aforesaid, pay to the person so kept out of possession, his executors, administrators or assigns, at the rate of double the yearly value of the lands, &c., so detained, for so long time as the same are detained, to be recovered in any court of record; against the recovering of which said penalty there shall be no relief in equity.

Since the statute is penal, it is construed strictly, and it does not apply to holding over by a weekly tenant (*f*), or, probably, by a quarterly tenant or other tenant for a term less than a year (*g*): but it applies to a tenant from year to year (*h*). To bring a case within the statute the holding over must be wilful and contumacious, the tenant being conscious that he has no right to retain possession; and it does not apply where the holding over is in consequence of a *bonâ fide* mistake or under a fair claim of right, and no fraud is intended (*i*); nor where the holding over is by a subtenant without the assent or authority of the tenant (*k*). The notice may be given either before (*l*) or after (*m*) the expiration of the tenancy, though if given after, the landlord must not have done any act in the meantime to recognize the person to whom the notice is given as continuing his tenant (*n*); and there need not be a distinct demand in addition to the notice. A notice to quit is itself a sufficient demand for possession to be given up (*o*). But the demand must be for delivery of possession at the end of the term, and a notice for noon on the last day is bad (*p*). In

Application
of statute.

Notice.

(*f*) *Lloyd v. Rosbee*, 1810, 2 Camp. 453.

(*g*) *Lloyd v. Rosbee*, *supra*. See *Wilkinson v. Hall*, 1837, 3 Bing. N. C.

508. (*h*) *Ryall v. Rich*, 1808, 10 East, 48.

(*i*) *Wright v. Smith*, 1805, 5 Esp. 203 (the headnote to this case does not correctly state its effect); *Soulsby v. Neving*, 1808, 9 East, p. 313; *Hirst v. Horn*, 1840, 6 M. & W. 393; *Swinfen v. Bacon*, 1860, 6 H. & N. 184; aff. 6 H. & N. 846; *Raebolton v. Marriott*, 1867, 16 L. T. 207.

(*k*) *Rands v. Clark*, 1870, 19 W. R. 48.

(*l*) *Cutting v. Derby*, 1776, 2 W. Bl. 1075; *Messenger v. Armstrong*, 1785, 1 T. R. 53.

(*m*) *Cobb v. Stokes*, 1807, 8 East, 358.

(*n*) *Cobb v. Stokes*, *ubi sup.*, per Lord Ellenborough, at p. 361.

(*o*) *Messenger v. Armstrong*, *supra*; *Hirst v. Horn*, 1840, 6 M. & W. 393.

(*p*) *Page v. Moore*, 1850, 15 Q. B. 684. The notice, when given before the expiration of the tenancy, may be in the following form:—

To Mr. C. D.

I hereby demand of you that you deliver up possession of the house [lands] and premises, with the appurtenances, situate at —, in the

Yearly
value.

Who may sue.

Action in
county court.

No distress
for double
value.

calculating the yearly value of the lands, only the value of the hereditaments as such is to be taken, and not the value of benefits relating to them, such as a supply of steam-power let with a room in a factory (*g*). The double value is reckoned from the determination of the tenancy, if the notice was given before such determination (*r*), or, if the notice was given after such determination, then from the time of giving the notice (*s*). The action lies at the suit only of the landlord or reversioner (*t*), and it cannot be brought by a lessee to whom the landlord has granted a fresh lease to begin from the expiration of the old one (*u*). The executor of the landlord can sue, though not the administrator of the executor without taking out administration *de bonis non*, although the tenant has attorned to him (*x*). The action can be brought in the county court, provided the amount claimed does not exceed 50*l.* (*y*). It can be brought notwithstanding that the landlord has obtained judgment in ejectment (*z*).

The landlord cannot distrain for double value (*a*) ; and if parish of —, in the county of —, on the — day of — next, being the day on which your term therein will determine. And I give you notice, that in case you hold over the said premises after the determination of such term, you will be required to pay at the rate of double the yearly value of the said premises for so long a time as the same shall be detained by you.

Dated this — day of —, 18—.

E. F.

If given after the tenancy has expired, the notice may be in the following form :—

To Mr. C. D.

I hereby demand of you that you immediately deliver up possession of the house [lands] and premises, with the appurtenances, situate at —, in the parish of —, in the county of —. And I give you notice, that in case you hold over the said premises after the service of this demand and notice, you will be required to pay at the rate of double the yearly value of the said premises for so long a time as the same shall be detained by you.

Dated this — day of —, 18—.

E. F.

(*g*) *Robinson v. Learoyd*, 1840, 7 M. & W. 48.

(*r*) *Soulshy v. Neving*, 1808, 9 East, 310.

(*s*) *Cobb v. Stokes*, 1807, 8 East, 358.

(*t*) Where the lease is by the husband holding in right of his wife, see *Harcourt v. Wyman*, 1849, 3 Ex. 817.

(*u*) *Blatchford v. Cole*, 1858, 5 C. B. N. S. 514.

(*x*) *Tingrey v. Brown*, 1798, 1 B. & P. 310.

(*y*) County Courts Act, 1888, s. 56 ; *Wickham v. Lee*, 1848, 12 Q. B. 521.

(*z*) *Soulshy v. Neving*, 1808, 9 East, 310.

(*a*) Judgment of Wilmot, J., in *Timmings v. Rowlison*, 1764, 1 W. Bl. p. 535.

he demands possession in the middle of a quarter or other term of payment, he cannot recover the rent for the antecedent fraction of such quarter or other term of payment (*h*). Acceptance of rent before an action is brought by the landlord for the double value may operate as a waiver of the landlord's claim to the double value; whether it does so or not is a question for the jury; but if rent is accepted after such action has been brought, it becomes a question whether it has been received in part satisfaction of the double value, or as a waiver of it (*c*).

Waiver of
double value.

In case any tenant shall give notice of his intention to quit the premises by him holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, the said tenant, his executors or administrators, shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving such notice could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall continue in possession as aforesaid (*d*).

Action or
distress for
double rent.
11 Geo. 2,
c. 19 (*cc*), s. 18.
Tenant hold-
ing over after
expiration of
notice to quit
given by him,
to pay double
rent.

A decision (*dd*) that this statute did not apply to weekly tenants seems to have been given under the erroneous assumption that it was similar to 4 Geo. 2, c. 28, and therefore governed by *Lloyd v. Rosbee* (*e*). In fact it applies to every tenant (*f*) who has power to determine his tenancy by notice, and who gives a notice binding upon him (*g*). The notice may be either verbal or written (*h*), but must be to quit at a fixed time. A notice to quit upon a contingency will not do, although the contingency happens and the

Application
of statute.

(*b*) *Cobb v. Stokes*, 1807, 8 East, 358.

(*c*) Judgment of Lord Ellenborough in *Ryall v. Rich*, 1808, 10 East, p. 52. See *Doe v. Batten*, 1775, 1 Cowp. 243, 246. As to pleading waiver, see *Rawlinson v. Marriott*, 1867, 16 L. T. 207.

(*cc*) The Distress for Rent Act, 1737. (*d*) See *Anon.*, 1773, Lofft. 275.

(*dd*) *Sullivan v. Bishop*, 1826, 2 C. & P. 359. (*e*) *Supra*, p. 515.

(*f*) See Bullen, Distress, p. 135, note (*c*).

(*g*) *Johnstone v. Huddestone*, 1825, 4 B. & C. 922, 931.

(*h*) *Timmins v. Rowleson*, 1764, 1 W. Bl. 533. It will be observed that the landlord's notice for double value (*ante*, p. 514) must be in writing. Wilmot, J., explained the reason of the difference to be that "landlords can usually write and tenants cannot": 1 W. Bl. 535.

tenant then declines to quit (*i*). The statute contemplates a continuing tenancy, and the double rent is recoverable by distress; but it ceases to be payable on the tenant's quitting possession, and he may do this at any time without giving a new notice to quit (*k*). In justifying a claim for double rent under the statute, the terms of the tenancy and of the notice to quit should be shown, that the tenant's power to determine the tenancy by notice and the sufficiency in law of the notice may appear (*l*).

(ii.) *Direct Remedies for Recovering Possession.*

ENTRY.

Entry.

1. On abandoned premises.

Where at the time of the expiration or determination of the tenancy there is no person in possession of the premises—the tenant having wholly abandoned them without any intention of returning—the landlord may enter and take possession (*m*).

2. On locked-up premises, where no one is in possession.

If the tenancy of a house is determined, and the tenant and his family have gone away, and the house is locked up—no one being in possession—the landlord is justified in breaking in and obtaining possession, although some articles of furniture may remain (*n*).

3. Where tenant is in possession.

Even where the tenant is in possession the landlord, after the expiration of the tenancy, may enter upon the premises, and may use such force as does not tend to a breach of the peace (*o*); but if he does more than this, he will be subject to an indictment under the Statutes of Forceful Entry (*p*), and subject also, under the same statutes, to be compelled by order of the justices to restore possession to the tenant. Moreover, though the forcible entry by itself gives rise to

(*i*) *Farrance v. Elkington*, 1801, 2 Camp. 591, 592.

(*k*) *Booth v. Macfarlane*, 1831, 1 B. & Ad. 904, 906.

(*l*) *Humberstone v. Dubois*, 1842, 10 M. & W. 765.

(*m*) *Lacey v. Lear*, 1802, Peake's Add. Cas. 210. See *Wildbor v. Rainforth*, 1828, 8 B. & C. 4, 6.

(*n*) *Hillary v. Gay*, 1833, 6 C. & P. 284; *Taunton v. Costar*, 1797, 7 T. R. 431; *Turner v. Meymott*, 1823, 1 Bing. 158.

(*o*) *Williams v. Taprell*, 1892, 8 T. L. R. 241. See *Scott v. Matthew Brown & Co., Lim.*, 1884, 51 L. T. 746.

(*p*) 5 Ric. 2, c. 7; 15 Ric. 2, c. 2; see also 8 Hen. 6, c. 9; 31 Eliz. c. 11. Forceful entry is "entry with a strong hand, with unusual weapons, or with menace of life or limb" (Bac. Abr. III., tit. "Forceful Entry"); and see *Edwick v. Hawkes*, 1881, 18 C. D. 199, 211.

no civil remedy (*q*), yet the landlord is liable in damages for any independent wrong, such as damage to the tenant or to his family or his property, done in the course of the entry (*r*). If, however, the landlord enters peaceably, and then, in the exercise of his rights as owner, injures property which is unlawfully upon the premises, he is not liable (*s*).

Statute of Limitations.

The lessor's right of entry or action is subject to be barred, and his title to be extinguished, by the Statute of Limitations. By sect. 1 of the Real Property Limitation Act, 1874 (*t*), it is provided that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years after the time when his right to make the entry or distress or to bring the action shall have accrued either to himself or to some person through whom he claims. For the cases of a tenancy at will and a tenancy from year to year the time when the right accrues, and when, therefore, the twelve years begin to run, is specially fixed. Under a tenancy at sufferance the owner has an existing right of entry, and the statute runs against him, from the commencement of the tenancy.

Right of entry
barred in
twelve years.

When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*x*), as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land

Tenancy at
will: R. P.
L. A., 1833(*u*),
s. 7.

(*q*) Per Fry, J., in *Beddall v. Maitland*, 1881, 17 C. D. 174, 188; *Taunton v. Costar*, *supra*; *Burling v. Read*, 1850, 11 Q. B. 904; *Pollen v. Brewer*, 1859, 7 C. B. N. S. 371; *Beattie v. Mair*, 1882, 10 L. R. Ir. 208, 211. See *Darison v. Wilson*, 1848, 11 Q. B. 890.

(*r*) *Newton v. Harland*, 1840, 1 M. & Gr. 644; *Hillary v. Gay*, 1833, 6 C. & P. 284; *Edwick v. Hawkes*, 1881, 18 C. D. 199, 211. This seems to be the better opinion, notwithstanding the view expressed at various stages of the litigation in *Newton v. Harland* by Alderson, B., Parke, B., and Coltman, J., and reiterated by the two former judges in *Harvey v. Brydges* (1845, 14 M. & W. 437), that the possession under the right of entry was lawful for all purposes and justified the removal of the tenant and his family as trespassers, provided only so much force was used as was necessary. Cf. *Blades v. Higgs*, 1861, 10 C. B. N. S. p. 721, and see Pollock on Torts, 5th ed. pp. 359, 360.

(*s*) *Jones v. Foley*, 1891, 1 Q. B. 730.

(*t*) 37 & 38 Vict. c. 57.

(*u*) 3 & 4 Will. 4, c. 27.

(*x*) *I.e.* rent-charge. See *Grant v. Ellis*, 1841, 9 M. & W. 113; *Irish Land Commission v. Grant*, 1884, 10 App. Cas. p. 26.

or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the commencement of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined (*y*).

When statute runs in favour of tenant at will.

Hence if the tenancy is actually determined within a year of its commencement, and the tenant remains in occupation without the creation of a fresh tenancy, time runs from such determination; if it is not determined within the year, time runs from the end of the year (*z*). Consequently, where the owner of a house or land lets a person into possession as tenant at will, and nothing further is done, his title is extinguished in thirteen years; and a merely permissive occupation has the effect of a tenancy at will. But the statute will not run if it can be shown that the occupation is as a guest (*a*) or servant (*b*), and not as a tenant. The operation of the statute is stopped by an entry on the part of the landlord such as to amount to a resumption of possession (*c*), or by the creation of a fresh tenancy at will or other tenancy (*d*), and also by an acknowledgment by the tenant of the landlord's title (*e*).

Tenancy from year to year :
R. P. L. A.,
1833, s. 8.

When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination

(*y*) No mortgagor or *cestui que trust* is to be deemed a tenant at will, within the meaning of the clause, to his mortgagee or trustee: sect. 7.

(*z*) *Doe v. Turner*, 1840, 7 M. & W. 226; *Doe v. Carter*, 1847, 9 Q. B. 863; *Day v. Day*, 1871, L. R. 3 P. C. 751; *Wimbledon Conservators v. Nicol*, 1894, 10 T. L. R. 247. The rule is well settled, though in *Randall v. Stevens*, 1853, 2 E. & B. 641, Lord Campbell, C.J., doubted this construction of the section. See *Sands to Thompson*, 1883, 22 C. D. 614.

(*a*) *Peakin v. Peakin*, 1895, 5 Ir. R. 359.

(*b*) *Moore v. Doherty*, 1843, 5 Ir. L. R. 449; *Allen v. England*, 1862, 3 F. & F. 49, note. See *Mayor of Brighton v. Guardians of Brighton*, 1880, L. R. 5 C. P. D. 368.

(*c*) *Randall v. Stevens*, 1853, 2 E. & B. 641; but an entry merely to repair is not sufficient: *Lyne v. Snaith*, 1899, 68 L. J. Q. B. 275.

(*d*) *Turner v. Bennett*, 1842, 9 M. & W. 643; *Locke v. Matthews*, 1863, 13 C. B. N. S. 753; *Hodgson v. Hooper*, 1860, 3 E. & E. 149. As to what constitutes a fresh tenancy, see *Jarman v. Hale*, 1899, 1 Q. B. 994.

(*e*) *Infra*, p. 522.

of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Since the section gives two alternative points from which the statute will run—the end of the first year of the tenancy or the last receipt of rent—it has been held that the lessor's title is not necessarily extinguished at the expiry of twelve years from the end of the first year, even though during such twelve years no payment of rent takes place. If, subsequently to the twelve years, rent is paid, the landlord has then a further similar period during which he can assert his title (*f*). The payment on which reliance is placed must be in respect of rent (*g*), and the payment may be proved by the parol admission of the tenant (*h*). From the date of such payment the statute forthwith commences to run afresh (*i*). The section only applies where there is no lease in writing, but to avoid the section there must be an instrument passing an interest in the land, and not merely showing the conditions of the holding (*k*).

When statute runs in favour of yearly tenant.

For the cases of a tenancy for a term of years and of a yearly tenancy under a lease in writing no special provision is made; but, since the lessor has no present right to possession, the statute does not run against him or persons claiming under him (*l*) until the determination of the term or of the yearly tenancy. The result is the same although no rent has been paid for more than twelve years (*m*). If the lease should be void, time will run from the date when possession is taken, unless a yearly tenancy is created by payment of rent (*n*). But in a case where there is no lease, the rights of the parties will be saved from the operation of the statute if in equity a lease must be assumed (*o*). Equitable rights,

Term of years.
Statute does not run in favour of lessee during term.

(*f*) *Bunting v. Sargent*, 1879, 13 C. D. 330; but, apart from authority, this construction of the section would seem to be erroneous. The lapse of the first period of twelve years extinguishes the title, and it cannot afterwards be revived. See *Sanders v. Sanders*, 1881, 19 C. D. 373.

(*g*) See *Att.-Gen. v. Stephens*, 1855, 6 D. M. & G. 111.

(*h*) *Doe v. Beckett*, 1843, 4 Q. B. 601.

(*i*) *Baines v. Lumley*, 1868, 16 W. R. 674.

(*k*) *Doe v. Gower*, 1851, 17 Q. B. 589.

(*l*) *Kennedy v. Woods*, 1867, 1r. R. 1 C. L. 76.

(*m*) *Doe v. Oxenham*, 1840, 7 M. & W. 131.

(*n*) *Magdalen Hospital v. Knotts*, 1879, 4 App. Cas. 324; *Webster v. Southey*, 1887, 36 C. D. 9.

(*o*) *Archbold v. Scully*, 1861, 9 H. L. C. 360.

equally with legal rights, prevent the bar of the statute (*p*). Hence, where a person has entered into possession under an agreement which entitles him to have a lease granted for a term, since the lessor would be restrained from exercising his right of entry, the statute does not run against the lessor during the currency of the agreed period (*q*). Where a surrender of a lease is implied from a grant of a new lease to the same lessee, the lessor acquires momentarily an estate in possession out of which the new leasehold interest is derived, and if a person is then in occupation without title, the lessor has also an immediate right of entry, and the statute will begin to run against him (*r*); but otherwise where an underlessee is in occupation (*s*).

Adverse title
of stranger
by receipt
of rent.

But though during the currency of a lease for a term the lessee can gain no title against the lessor; nor can a stranger who merely enters and occupies (*t*); yet, if there is a lease in writing by which a rent of 20*s.* or upwards is reserved, a stranger who wrongfully claims to be entitled to the reversion (*u*), and who actually receives the rent (*x*), may gain a title against the true owner, the statute in such a case running from the first wrongful receipt of rent (*y*).

Acknowledg-
ment.

In all cases where the statute is running against the owner of land, its operation can be stopped by the acknowledgment of the owner's title by the person in possession. Such acknowledgment must be in writing; it must be given to the person entitled, or his agent; and it must be signed by the person in possession (*z*). Immediately after the acknowledgment the statute will begin to run afresh (*a*); but if the statutory period has already run, so that the

(*p*) R. P. L. A., 1833, s. 24.

(*q*) *Drummond v. Sant*, 1871, L. R. 6 Q. B. 763; *Warren v. Murray*, 1894, 2 Q. B. 648. See *White v. Whitewood*, 1897, 13 T. L. R. 409.

(*r*) *Ecclesiastical Commissioners v. Rowe*, 1880, 5 App. Cas. 736, per Lord Selborne, C.

(*s*) *Corpus Christi College v. Rogers*, 1879, 49 L. J. Q. B. 4; *Ecclesiastical Commissioners v. Trecemer*, 1893, 1 Ch. 166.

(*t*) *Chudrick v. Broadwood*, 1840, 3 Beav. 308.

(*u*) See *Lyell v. Kennedy*, 1889, 14 App. Cas. 437; *Shaw v. Keighron*, 1869, 3 Ir. R. Eq. 574. (*x*) *Twiss v. Noblet*, 1869, 4 Ir. R. Eq. p. 78.

(*y*) R. P. L. A., 1833, s. 9. See *Scott v. Nixon*, 1843, 2 Con. & L. p. 191.

(*z*) R. P. L. A., 1833, s. 14. As to personal signature by the person in possession, see *Ley v. Peter*, 1858, 3 H. & N. 101; *Corp. of Dublin v. Judge*, 1847, 11 Ir. L. R. 8.

(*a*) See *Scott v. Nixon*, 1843, 3 Dr. & War. p. 404.

owner's title is extinguished under sect. 34 of the Real Property Limitation Act, 1833, no subsequent acknowledgment will revive it (*b*).

ACTION IN THE HIGH COURT.

By the Common Law Procedure Act, 1852 (*c*), a summary procedure was introduced whereby the landlord could in an action of ejectment recover possession of the premises against a tenant holding over after the expiration of the term (*d*); and in any action of ejectment by a landlord against a tenant the jury were empowered to find a verdict both for recovery of the premises and for mesne profits down to the time of verdict (*e*). These provisions are still in force, but for the action of ejectment has now been substituted an action for the recovery of land (*f*) brought under the Rules of the Supreme Court, 1883; and in practice the summary method by special indorsement of the writ has superseded sect. 213, while sect. 214 is replaced by the provision that claims in respect of mesne profits may be included in the action for recovery of land (*g*).

Action for
recovery of
land.

In actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim (*h*), or of the remedy or relief to which he claims to be entitled (*i*). This rule only applies where the term has expired in the ordinary course, or has been regularly determined by notice to quit; not where it is determined by surrender (*k*) or forfeiture (*l*). But it applies where a tenancy at will, including such a tenancy existing under a mortgage, is ended by the determination of the landlord's

Special
indorsement.

(*b*) *Sanders v. Sanders*, 1881, 19 C. D. 373, overruling *Stansfield v. Hobson*, 1853, 3 D. M. & G. 620.

(*c*) 15 & 16 Vict. c. 76.

(*d*) Sect. 213.

(*e*) Sect. 214.

(*f*) See *Gledhill v. Hunter*, 1880, 14 C. D. 492. It has been held in Ireland that the action is not exclusively reserved to the Common Law Divisions: *Clanricarde v. Ryder*, 1898, 1 Ir. R. 98.

(*g*) Ord. 18, r. 2.

(*h*) As to what the writ should show, see *Hammer v. Clifton*, 1894, 1 Q. B. 238.

(*i*) Ord. 3, r. 6.

(*k*) *Doe v. Roe*, 1831, 2 B. & Ad. 922, decided on the corresponding provision of 1 Geo. 4, c. 87, s. 1.

(*l*) *Arden v. Boyce*, 1894, 1 Q. B. 796. See *Doe v. Sharpley*, 1846, 15 M. & W. 558.

will (*m*). It applies only where the plaintiff is the landlord who originally granted the lease, or, if the plaintiff derives title under such original landlord, the defendant must be estopped, by payment of rent or otherwise, from disputing his title (*n*); and the facts creating the estoppel must not be in dispute (*o*). Where the writ is specially indorsed and the defendant has appeared to it, judgment may, unless the defendant gets leave to defend, be obtained summarily under Ord. 14, and the judgment may include mesne profits to be calculated up to the date of the plaintiff's obtaining possession (*p*).

Procedure.

Where the writ is not specially indorsed the action will proceed to trial in the ordinary way, subject to the special rules relating to an action for recovery of land. The plaintiff will be the person in whom the legal reversion is vested (*q*), but an exception exists in the case of a mortgagor in possession, provided the mortgagee has not given notice of his intention to take possession. The mortgagor can sue for possession in his own name only (*r*). If the possession of the premises is vacant, service of the writ, if it cannot otherwise be effected, may be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*s*). Where the action is brought only to recover land situate within the jurisdiction (with or without rents or profits), the writ may, by leave of the Court or a Judge, be served out of the jurisdiction (*t*). Judgment for the recovery of possession of land may be enforced by writ of possession (*u*), and the writ will issue notwithstanding that the landlord's estate in the premises

(*m*) *Kemp v. Lester*, 1896, 2 Q. B. 162; *Daubuz v. Lavington*, 1884 13 Q. B. D. 347; *Hull v. Comfort*, 1886, 18 Q. B. D. 11; *Jerred v. Edwards*, 1891, 92 L. T. Jo. 8. As to attornment clauses, *vid. supra*, p. 83.

(*n*) *Casey v. Hellyer*, 1886, 17 Q. B. D. p. 99.

(*o*) See *Jones v. Stone*, 1894, A. C. 122.

(*p*) *Southport Tramways Co. v. Gandy*, 1897, 2 Q. B. 66.

(*q*) *Allen v. Woods*, 1893, 68 L. T. 143. One tenant in common may bring ejectment for his share of the premises: *Cutting v. Derby*, 1776 2 W. Bl. 1077.

(*r*) Judic. Act, 1873, s. 25 (5). See *Matthews v. Usher*, 1899 68 L. J. Q. B. 988.

(*s*) Ord. 9, r. 9. See Annual Practice, 1900, p. 227; and see further as to procedure Ord. 12, r. 28 (defence limited to part of property claimed) Ord. 13, rr. 8, 9 (judgment in default of appearance, or upon limited defence); Ord. 27, rr. 7, 8 (judgment in default of pleading).

(*t*) Ord. 11, r. 1 (a); judgment of Coleridge, J., in *Agnew v. Usher* 1884, 14 Q. B. D. 78.

(*u*) Ord. 42, r. 5; Ord. 47, rr. 1, 2. Where the execution of the writ will evict a person other than the defendant, who has no notice of the

has terminated after the commencement of the action and before trial, unless the issue would be unjust and futile; and this it lies upon the defendant to show (*r*).

Where an action to recover the land is brought against the tenant by a person claiming adversely to the landlord, the tenant is required, under penalty of forfeiting the value of three years improved or rack-rent of the premises (*x*), to give notice to the landlord, so that the latter may defend his title (*y*). The landlord can then, by leave of the Court or a Judge, appear and defend (*z*).

Claim by
stranger.

ACTION IN THE COUNTY COURT.

The landlord can recover possession in the county court, either by an action for the recovery of possession, or by an action for the recovery of land (*a*). The first is a procedure specially designed for the case of landlord and tenant, and applies where the tenant is holding over or where the landlord has a present right of re-entry for rent in arrear; the second corresponds to the ordinary procedure in ejectment.

The County Courts Act, 1888, provides that when a tenancy of any corporeal hereditament, where neither the value of the premises nor the rent exceeds 50*l.* a year (*b*), has expired or has been determined by landlord or tenant by notice to quit, and the tenant, or any person holding or claiming under him, neglects or refuses to deliver up possession, possession of the premises may be recovered upon a plaint entered by the landlord (*c*) in the county court of the district in which the premises lie (*d*). The section only applies where there is the ordinary relation of landlord and tenant existing (*e*). In the County Courts Act, 1856 (*f*), s. 50, "legal notice" was mentioned (*g*), but action, and who does not claim to hold through the defendant, the judgment will be set aside so far as concerns such person on his electing to be added as defendant: *Minet v. Johnson*, 1890, 63 L. T. 507. See Ord. 12, r. 25.

Action to
recover
possession.
Tenant hold-
ing over.

51 & 52 Vict.
c. 43, s. 138.

(*v*) *Knight v. Clarke*, 1885, 15 Q. B. D. 294. See *Gibbins v. Buckland*, 1863, 1 H. & C. 736. (*x*) See *Urocker v. Fothergill*, 1819, 2 B. & A. 652.

(*y*) Common Law Procedure Act (15 & 16 Vict. c. 76), s. 209.

(*z*) See R. S. C. Ord. 12, rr. 25—27. As to ejectment by mortgagee, see *Buckley v. Buckley*, 1787, 1 T. R. 647. (*a*) C. C. R. 1888, Ord. 5, r. 3.

(*b*) Where the rent is originally over 50*l.* a year, the case is not brought within the section by a verbal agreement to reduce the rent, there being no new demise: *Crowley v. Fittes*, 1852, 7 Ex. 319.

(*c*) Sect. 186. (*d*) *Ellis v. Peachy*, 1849, 18 L. J. Q. B. 137.

(*e*) *Jones v. Owen*, 1848, 18 L. J. Q. B. 8; *Banks v. Rebeck*, 1851, 20 L. J. Q. B. 476. (*f*) 19 & 20 Vict. c. 108.

(*g*) *Friend v. Shaw*, 1887, 20 Q. B. D. 374.

under the present enactment it seems that a notice in accordance with the agreement of the parties will determine the tenancy for the purpose of the section, although it is not a strict legal notice. An order made under the section is not conclusive as to title (*h*), and it seems that the jurisdiction of the county court is not excluded by a question of title being in dispute (*i*). The landlord can proceed in the county court notwithstanding that an action of ejectment brought by him is pending in the High Court (*k*); but he is liable to have the county court action struck out unless the High Court action is discontinued (*l*).

Rent in arrear
and no dis-
tress.

Sect. 139.

Sect. 139 provides a summary procedure for the recovery of the premises of the value above mentioned when a half year's rent is in arrear and no sufficient distress is to be found on the premises. On plaint entered by the landlord and on proof of the matters mentioned in the section, the judge may order possession to be given to the landlord on or before such day, not less than four weeks from the hearing, as the judge thinks fit to name, unless within that period all the rent in arrear and the costs are paid into court.

Action for
recovery of
land.

Sect. 59.

The same Act provides that all actions of ejectment where neither the value of the lands, tenements or hereditaments, nor the rent payable in respect thereof, exceeds 50*l*. a year (*m*), may be brought in the county court of the district in which the premises are situate. Up to the specified limit this action corresponds to the action to recover land in the High Court, and the procedure is regulated in a similar manner (*n*). A subtenant upon whom process is served must forthwith give notice to his immediate landlord, under penalty of forfeiting three years' rack-rent of the premises (*o*). The county court has jurisdiction

(*h*) *Campbell v. Loader*, 1865, 3 H. & C. 520, 525; *Hodson v. Walker* 1872, L. R. 7 Ex. 55.

(*i*) Sect. 60 of the Act of 1888 seems to avoid the contrary effect of *Kerkin v. Kerkin*, 1854, 3 E. & B. 399, and *Pearson v. Glazebrook*, 1867, L. R. 3 Ex. 27, decided on sect. 58 of the Act of 1846.

(*k*) *Bissill v. Williamson*, 1861, 7 H. & N. 391.

(*l*) C. C. R. Ord. 22, r. 9.

(*m*) As to ascertaining the rent for this purpose, see *Elston v. Rose*, 1868, L. R. 4 Q. B. 4; *Brown v. Cocking*, 1868, L. R. 3 Q. B. 672.

(*n*) See C. C. R. Ord. 4, r. 1 (as to joining other causes of action); Ord. 7, r. 21 (service where possession is vacant); Ord. 10, r. 4 (letting landlord in to defend); Ord. 10, r. 5 (limiting defence to part of property); Ord. 9, r. 6 (admission of title).

(*o*) Sect. 140.

where the dispute relates to a part of premises worth less than 50*l.* a year, although the entire premises are let at a rent exceeding that sum (*p*).

There is a right of appeal in a county court action upon any point of law or equity, or upon the admission or rejection of any evidence; but in an "action for the recovery of tenements," leave to appeal is required if the yearly rent or value of the premises does not exceed 20*l.* (*q*). The phrase "action for the recovery of tenements" has been held to include an action for the recovery of land under s. 59, so as to import the 20*l.* limit into an appeal in such an action (*r*), but it seems more probable that the limit only applies to actions under ss. 138 and 139 (*rr*).

PROCEEDINGS BEFORE JUSTICES.

In certain cases possession may be recovered by proceedings before justices under the Small Tenements Recovery Act, 1838 (*s*), or, if the premises are deserted, under the Distress for Rent Act, 1737 (*t*):—

When the term or interest of the tenant of any house,

1 & 2 Vict.
c. 74, s. 1.

(*p*) *Stothworthy v. Powell*, 1886, 55 L. J. Q. B. 228; *Rutherford v. Wilkie*, 1879, 41 L. T. 435.

(*q*) Sect. 120.

(*r*) *E. of Shrewsbury v. Garfield*, 1891, 60 L. J. Q. B. 765.

(*rr*) See County Court Practice, 1899, p. 436, note (*c*).

(*s*) 1 & 2 Vict. c. 74. The procedure of this statute is applied by the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 111, to the recovery of possession of allotment gardens let under that Act, and by the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 12, to allotments under this latter Act. It also applies to allotments under the Allotments Act, 1887 (50 & 51 Vict. c. 48), possession of such allotments being recoverable under sect. 8 (1) by the sanitary authority as landlords, in the same manner as in other cases of landlord and tenant. By the Grammar Schools Act, 1840 (3 & 4 Vict. c. 77), s. 19, it is extended to the recovery of school premises from a dismissed master; by the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 13, to the recovery of charity premises held over by an officer or recipient of the benefit of a charity; and by the Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 12, to the recovery of lands purchased by the Admiralty. As to recovery of possession against tenants of parish lands, see the Poor Relief Act, 1819 (59 Geo. 3, c. 12), ss. 24, 25; *R. v. J.J. of Middlesex*, 1839, 7 Dowl. 767; *Wildbor v. Rainforth*, 1828, 8 B. & C. 4; *Appleton v. Murray*, 1860, 8 W. R. 633. The jurisdiction of the justices under this last Act is not ousted by a claim of title: *Ex parte Vaughan*, 1866, L. R. 2 Q. B. 114. As to reviewing the decision of the justices under these statutes, see *R. v. Bolton*, 1841, 1 Q. B. 66. As to recovery of possession of land which is to be inclosed under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), see the Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 13, and *Chilcote v. Fouldon*, 1860, 3 E. & E. 7.

(*t*) 11 Geo. 2, c. 19, s. 16.

If tenant at rent not exceeding 20*l.* a year upon expiration or determination of his interest refuses or neglects to deliver up possession, landlord may serve him with notice of his intention to proceed under this Act.

If tenant does not appear before justices and show cause why possession should not be delivered up, on proof by landlord of

land or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of 20*l.* a year, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession, to be served (in the manner hereinafter mentioned) with a written notice in the form set forth in the schedule to this Act (*u*), signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises,

(*u*) *Form of Notice.*

I, — [owner, or agent to —, the owner, *as the case may be*], do hereby give you notice, that unless peaceable possession of the tenement [*shortly describing it*] situate at —, which was held of me, or of the said — [*as the case may be*], under a tenancy from year to year, or [*as the case may be*], which expired [*or was determined*] by notice to quit from the said —, or otherwise [*as the case may be*], on the — day of —, and which tenement is now held over and detained from the said —, be given to — [the owner or agent] on or before the expiration of seven clear days from the service of this notice, I, —, shall on — next, the — day of —, at — of the clock on the same day, at —, apply to her Majesty's justices of the peace acting for the district of — [*being the district, division or place in which the said tenement, or any part thereof, is situate*], in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement and to eject any person therefrom.

Dated this — .

(Signed) —,
[owner or agent].

To Mr.

As to the sufficiency of the notice, see *Delaney v. Fox*, 1856, 1 C. B. N. S. 166. As to service of the notice, see sect. 2.

or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them (*v*), to issue a warrant under their hands and seals to the constables and peace officers of the district, division or place within which the said premises or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent.

certain facts, justices may issue warrant directing constables to give possession of premises to landlord.

The section does not protect the applicant from an action for unlawful entry (*x*), nor does it affect the outgoing tenant's rights under the custom of the country or otherwise (*y*). But the justices and the constable issuing and executing the warrant are protected (*z*).

The statute only applies where there is the relation of landlord and tenant between the parties (*a*). A tenant cannot for the purpose of making his rent exceed 20*l.*, and so excluding the statute, reckon sums not properly rent

(*v*) A stipendiary magistrate may exercise alone any jurisdiction exercisable by two justices: Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1; and so may the Lord Mayor or any alderman of the city of London sitting at the Mansion House or Guildhall: Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 34.

(*x*) Under sect. 3 the tenant may procure the execution of the warrant to be stayed until he has sued the applicant for trespass. See *Darlington v. Pritchard*, 1842, 4 M. & Gr. 783; *Flitters v. Alfrey*, 1874, L. R. 10 C. P. 29.

(*y*) Proviso to sect. 1.

(*z*) Sect. 5. It is doubtful whether this section protects a person acting in aid of the constable: *Edmunds v. Pinniger*, 1845, 7 Q. B. 558; and as to the applicant's liability in case of irregularity in the proceedings, see sect. 6: *Delancy v. Fox*, 1856, 1 C. B. N. S. 166.

(*a*) *Brown v. Newmarch*, 1875, 40 J. P. 212; *Webb v. Fordred*, 1868, 32 J. P. 804.

which he has undertaken to pay, such as rates and taxes for another part of the premises (*b*). Where the tenancy and its determination and the tenant's refusal to quit are proved, the jurisdiction of the justices is not ousted by the tenant's setting up the title of a third person (*c*). It is essential that the warrant shall be to a constable or police officer, and the subsequent proceedings justifying the entry must allege this (*d*). The issue of the warrant does not abridge the lessor's common law right of entry, and he may exercise such right within the twenty-one days of grace during which the warrant cannot be enforced (*e*).

For the case of deserted premises, the Distress for Rent Act, 1737, provides as follows:—

In case of
deserted
premises.

11 Geo. 2,
c. 19. s. 16.

If tenant,
owing half-
year's rent
desert the
demised
premises, so
that no
sufficient dis-
tress can be
found, land-
lord may
request two
justices to
come and view
the same.

And to affix
on premises

If any tenant holding any lands, tenements, or hereditaments at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one (half-year's (*f*)) rent, shall desert the demised premises (*g*), and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall be lawful for two or more justices of the peace of the county, riding, division or place (having no interest in the demised premises) at the request (*h*) of the landlord or his bailiff to go upon and view the same (*i*), and to affix or cause to be affixed on the most notorious part of the premises notice in writing what day (at the distance of fourteen days (*k*) at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person on his behalf, shall

(*b*) *Re J.J. of Richmond*, 1893, 10 T. L. R. 68.

(*c*) *Rees v. Davies*, 1858, 4 C. B. N. S. 56.

(*d*) *Jones v. Chapman*, 1845, 14 M. & W. 124.

(*e*) *Jones v. Foley*, 1891, 1 Q. B. 730.

(*f*) 57 Geo. 3, c. 52.

(*g*) See *Ex parte Pilton*, 1818, 1 B. & A. 369.

(*h*) The request or complaint need not be on oath: *Basten v. Carew*, 1825, 3 B. & C. 649.

(*i*) Under the Metrop. Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 13, a metropolitan police magistrate is not required to view the premises; he may send a constable instead, in manner specified in the section. But this exemption does not extend to the Lord Mayor or an alderman sitting at the Mansion House or Guildhall; *Edwards v. Hodges*, 1855, 15 C. B. 477.

(*k*) I.e. clear days: *Creak v. Justices of Brighton*, 1858, 1 F. & F. 110.

not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord into the possession of the said demised premises, and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void.

An appeal may be made from the decision of the justices to the judge of assize (*l*) ; but, although the order of the justices is reversed, an action of trespass for the eviction does not lie against either the justices, the constable, or the landlord, provided, as to the landlord, that he has not misled the justices (*m*).

notice of time at which they will take second view. If tenant at such second view do not appear and pay rent and there is no sufficient distress, justices to put landlord in possession and demise to be thenceforth void.

(*l*) Sect. 17. See *R. v. Sewell*, 1845, 8 Q. B. 161 ; *R. v. Traill*, 1840, 12 A. & E. 761.

(*m*) *Ashcroft v. Bourne*, 1832, 3 B. & Ad. 684 (where the justices were overruled on the fact of desertion) ; *Basten v. Carew*, *supra*. As to mandamus to compel the magistrates to deliver possession, see *Ex parte Fulder*, 1840, 8 Dowl. 535.

INDEX.

ABANDONED PREMISES,

- entry of landlord upon, at expiration of lease, 518.
- proceedings before justices for recovery of, 530.

ABANDONMENT OF DISTRESS,

- quitting possession of goods does not necessarily operate as, 268.
- tenant may retake abandoned distress, 269.

ABATEMENT OF RENT,

- agreement for, 104.
- effect of, 458.

ABUTTALS, construction of, 128.

ACCEPTANCE,

- of assignee as tenant by lessor, 410.
- new lease, when implied surrender, 456.
- offer, 102.
- rent from tenant holding over, 95.
- under agreement for lease, 94.
- void lease, 94.
- when waiver of double value, 517.
- forfeiture, 468.
- notice to quit, 447.
- third person as tenant with consent of prior tenant, 458.
- undertenant as tenant by lessor, 459.

ACCIDENTAL DEFECT IN PREMISES, liability of landlord for, 310.

ACKNOWLEDGMENT,

- of antecedent tenancy, 219, *n. (c)*.
- does not require lease stamp, 170.
- when it authorises distress, 219, *n. (c)*.
- of lease by married woman, 15, 17.
- want of, 179, *n. (q)*.
- of title, 522.

ACQUIESCENCE,

- as a bar to action on covenant, 344.
- in breach of covenant, 159.
- irregularity of notice to quit, 449.

ACT OF PARLIAMENT, effect of definition of words by, 123.

ACTION,

- acceptance of agreement by bringing, 102.
- for damages for breach of agreement to let, 113.
 - double rent. *See* DOUBLE RENT.
 - double value. *See* DOUBLE VALUE.
- excessive distress, 261.
- illegal distress, 288.
- irregular distress, 290.
- pound-breach, 269.
- premature sale under distress, 279.
- recovery of land. *See* LAND.
- rent. *See* RENT.
- specific performance, 114.
- use and occupation. *See* USE AND OCCUPATION.
- waste, 329.
- of ejection. *See* LAND.
- replevin. *See* REPLEVIN.
- on covenants, parties to, 157.
- to recover possession. *See* POSSESSION.

ADDITIONAL RENT, 199, 200.

- for improvements, 190.
- on breach of covenants, 199.
 - distress for, 221.
- reservation of, 152.
- whether a penalty, 199.

ADHESIVE STAMP,

- when duty on lease may be denoted by, 171, *n.* (z).
- penalty for not affixing before execution of instrument, 175.

“ADJOINING,” meaning of, 337.

ADJOINING OWNERS, liability to repair fences, 352.

ADMINISTRATION ACTION, effect of judgment in, 61.

ADMINISTRATION, restraint on distresses in certain cases of, 300.

ADMINISTRATOR,

- distress by, 226.
- lease by, 60, 61.
 - administrator *ad colligenda bona defuncti*, 60.
 - administrator *durante absentia*, 60.
 - administrator *durante minor etate*, 60.
 - administrator, when real representative, 62.
- liability of, for rent and upon covenants in lease, 420, 421.

ADMINISTRATOR OF CONVICT,

- convict's property vests in, 428.
- leases by, 22, 429.

ADMISSIONS, by tenant, evidence of time of commencement of tenancy, 438.

ADVANCE, RENT PAYABLE IN,
 custom of country as to, 192.
 mode of reservation of, 146.
 when it may be distrained for, 222.

ADVANCES, by tenant on account of rent not due, effect of, 193.

ADVOWSON, lease of, now prohibited, 2.

AGENT,

 appointment of, to contract, 108.
 execute lease by deed, 70.
 authority of, to lease, 71.
 clerk of, signature of memorandum by, 108.
 lease by, 70.
 mode of execution of, 72.
 lease to, by principal, 73.
 notice to quit by, 443.
 occupation by, 87.
 party to memorandum in writing, 106.
 payment of rent to, 195.
 by cheque, 215.
 effect of, as evidence of principal's title, 216.
 personal liability of, 72.
 revocation of authority of, 195.

AGISTMENT, cattle at,
 tender of rent by owner of, 273.
 when they may be distrained, 240.

AGREEMENT,

 acceptance of, 102.
 collateral, parol evidence of, 123.
 executory, effect of, where tenant not to be disturbed while rent paid, 145.

AGREEMENT FOR LEASE, 102. *See* CONTRACT.

 by copyholder, 115, *n.* (a).
 costs of, 184.
 effect of, in county court, 82
 how distinguished from lease, 79.
 to be made, 102.
 liability for rent under parol, 104.
 occupation under, effect of, 91.
 payment of rent under, effect of, 94.
 present effect of, 95.
 relief against forfeiture of, 475.
 remedies for breach of, 113.
 action for damages, 113.
 for specific performance, 114.

AGREEMENT FOR LEASE—*continued*.

- rights of intended lessee under, 111.
 - as to title, 111.
 - as to covenants, 112.
- stamp on, 117.
 - counterpart of, 118.
- stamping, where property sold, 175.
- sums reserved on, 190, 219.
- where no stipulation as to covenants, 112.
- within Statute of Frauds, 103.

AGREEMENT,

- for new lease under power, 55.
 - underlease. *See* UNDERLEASE.
- sale, registration of memorandum of, 401.
- injunction in aid of, 116.
- made as escrow, 108.
- not to distrain, effect of, 218.
- not to raise rent, 145.
- partly relating to land, 104.
- parol, when enforceable, 108.
 - part performance, 108.
 - fraud, 104.
 - agreement admitted and statute not insisted on, 109.
- to be performed within year, 123, *n.* (g).
- to let, effect of before Judicature Acts, 79.
 - effect of under Judicature Acts, 81, 82.
 - remedies for breach of, 113.
 - “while property in lessor’s hands,” 106.
- to take a lease, stamp on, 117.
- to underlet, where restraint on underletting, 112.
- unstamped, parol evidence of, not allowed, 117.

AGRICULTURAL CUSTOM, when good, 346.

AGRICULTURAL FIXTURES,

- right to remove,
 - at common law, 488.
 - statutory right to remove, 489.
 - under Agricultural Holdings Act, 1883, 489.

AGRICULTURAL HOLDING,

- dispute as to distress on, 289.
 - as to ownership of live stock distrained on, 289.
 - as to price for feeding stock, 289.
- length of notice to quit, 435.
- limitation of distress on, 253, 254.
- resumption of possession of part of, 442.

AGRICULTURAL HOLDINGS ACT, 1883,

- agreements under, for substituted compensation, 504, 505.
- amount of compensation, how estimated, 506.
 - deductions from, 506.

AGRICULTURAL HOLDINGS ACT, 1883—*continued*.

- claim by landlord under, 507, *n.* (q).
- compensation under, recovery of, 507, *n.* (q), 509.
 - when payable, 504.
- effect of change of tenancy, 505.
- exclusive of other compensation, 505.
- holdings to which Act applies, 502.
- improvements in last year of tenancy, 506.
- "landlord" and "tenant" under, 509.
- notice of claim under, 507.
- reference under, 508.
- right to compensation under, 502.
- schedule of improvements under, 502.
- settlement of compensation under, 508.
- time for removal of fixtures under, 492.

AGRICULTURAL LAND,

- exemption of occupiers of, from rates, 361.
- usual covenants in, 152.

ALIEN, lease by or to, 22.

ALTERATIONS, enforcement of covenant against, 327.

- in lease, after execution, effect of, 179.

ALLOTMENTS,

- compensation on compulsory hiring of land by parish council for, 509.
- compensation to outgoing tenants of, 510.
- failure of sanitary authority in duty as to, 37.
- letting of charity lands for, 41.
- letting of, by parish council, 37.
 - by public authority in, 36.
- recovery of possession of, 527, *n.* (s).
- removal of buildings from, 486.
 - trees from, 37, 486.

AMBASSADOR, goods of, privileged from distress, 239.

- rates of house occupied by, 366, *n.* (n).

ANNOYANCE TO NEIGHBOURS, covenant against, 338.

AMENDS, tender of, before action for irregular distress, 291.

ANIMALS. *See* CATTLE.

- feræ naturæ* cannot be distrained, 235.
- impounded, to be supplied with food and water, 267.

APPORTIONMENT OF RENT,

- distress for apportioned rent, 221.
- in respect of estate*, 211.
 - how made, 211, 212.
 - no apportionment as between land and goods, 213.
 - not of personal liability, 212.

APPORTIONMENT OF RENT—*continued*.*in respect of estate—continued.*

- not where lessee cannot obtain possession of part, 212.
- on grant or devise of part of reversion, 211.
- on loss of part of land from natural causes, 212.
- on severance of reversion by death of lessor intestate, 211.
- on tenant's losing possession of part of premises (otherwise than by wrongful eviction), 212.
- where land taken for sites for schools, 213, *n.* (d).
- where land taken under Church Building Acts, 213, *n.* (d).
- where part of lands taken under Lands Clauses Act, 213.
- where tenant quits part of holding under Agricultural Holdings Act, 213.

in respect of time, 213.

- apportioned rent, when payable, 214.
- effect of Act of 1870, 214.
- in bankruptcy, 214, 301.
- in winding up, 303.
- liability for apportioned parts, 214.
- no apportionment of rent payable unequally, 214, *n.* (n).
- not in favour of wrongful evictor, 214.

APPRAISEMENT OF DISTRESS, 274.

- action for selling goods distrained without, 290.
- growing crops, in case of, 275.
- memorandum of appraisement, 275.
 - stamp on, 275.
- sale to appraisers, 279.
- when now necessary, 274.
- who may be appraisers, 275.

APPRAISERS, sale to, of goods distrained, 279.

APPROVAL OF SURVEYOR, as condition precedent, 319.

APPURTENANCES,

- meaning of term, 132.
- to a house, what may pass as, 133.
- to land, what may pass as, 133.

ARBITRARY refusal to permit assignment, 394, 395.

ARCHBISHOPS, leases by, 27.

See ECCLESIASTICAL CORPORATIONS.

ARREAR, when rent is in, 194, 222.

ARREARS OF RENT, limitation on recovery of, 253.

ARTIZANS' DWELLINGS, leases of land for, 35.

ASSENT,

- by executor to bequest of term, 418.
 - effect of, 418,
 - evidence of, 418.
- where bequest is to executor, 419

- ASSENT TO AGREEMENT, subject to formal contract, 103.
 ASSIGN, RIGHT TO, 391. *See* ASSIGNMENT.
 ASSIGN, AGREEMENT TO, subject to lessor's approval, 396.
 ASSIGNEE OF PRODUCE, bound by covenants as to use, 351, 352.
 ASSIGNEE OF TERM,
 acceptance of, as tenant by lessor, 410.
 equitable liability of, 402.
 liability of, to lessee, 410.
 on indemnity, 411.
 liability of, to lessor,
 for rent, 401.
 on covenants, 401.
 covenants which run with land, 404.
 when assignment is without licence, 396.
 when assignment is from a joint lessee, 402.
 reassignment, effect of, on liability, 409.
 to whom it may be made, 409.
 rights of, against assignor as to title, 398.
 lessor on covenants, 401.
 who is an, 401.
 ASSIGNEE OF REVERSION, action by, 413, 417.
 distress by, 223.
 no right to re-enter for breach before assignment, 359.
 ASSIGNMENT,
 acquiescence in, by lessor, 396.
 consent to, omission to ask, 395.
 arbitrarily withholding, 394.
 contract for, 397.
 covenant against, 475.
 breach of, 393.
 construction of, 392.
 continuing breach of, 471.
 damages for breach of, 396.
 on whom binding, 393.
 covenant to employ particular person for making, 400, *n.* (x).
 creditors' deed, in, 403.
 effect of, 401.
 for unlawful purpose, 412.
 how distinguished from underlease, 386.
 licence to assign, 394.
 effect of, 397.
 payment for, 396.
 mode of making, 399.
 assignor may assign directly to himself and another, 400.
 deed necessary, 399.
 parol agreement for, 398.
 payments reserved on, 191.

ASSIGNMENT—*continued*.

- registration of, 400. *See* REGISTRATION.
- stamp on, 399.
- sums by way of rent reserved upon, 191, 223.
- upon death of lessee, 418. *See* DEATH.
- bankruptcy of lessee, 423. *See* BANKRUPTCY.
- without consent, forfeiture for, 477

ASSIGNMENT OF RENT, to whom rent payable after, 197.

ASSIGNOR OF LEASE, duty of, to procure license, 396.

ASSIGNS,

- covenants which run with land only when assigns are named, 405.
- effect of naming, in covenants, 157, 404, 405.

ATTESTATION of leases by deed, 179.

- under powers to lease, 58.

ATTORNMENT,

- clause in mortgage deed, 83.
- power of distress, under, 83.
- recovery of possession under, 84.
- creation of tenancy by, 82.
- evidence of landlord's title, 82.
- not necessary on grant of reversion, 413.
- stamp on, 82.
- what amounts to, 216.

AUCTION, SALE BY,

- covenant against, 338, *n.* (t).

AUCTIONEER,

- authority of, to sign memorandum, 108.
- goods in hands of, for sale, protected from distress, 231, 232.

AVOIDANCE OF LEASE, effect of, on prior surrender, 455.

AWAY-GOING CROP,

- custom to leave in barns, effect of, 250.
- possession for purpose of, 500.
- right to, 498.

BAILIFF,

- county court, of,
 - fees on execution, 297.
 - liability in execution, 297.
 - notice to, that rent is due, 297.
- power of, to let, 71.
- ratification of contract of, 71.
- to distrain*, 254.
 - certificate of, 254.
 - production of, 282.
 - employment of, 254.

BAILIFF—*continued.**to distrain—continued.*

- indemnity to, by landlord, 255.
- landlord's liability for acts of, 255.
- liability of, to landlord, 256.
- must give copy of charges, 282.
- tender of rent to, 257, 272.
- sale by, to pay fees, 282, *n.* (x).
- warrant of distress, 255.

BANKRUPT, specific performance not ordered against, 116.

BANKRUPT ASSIGNEE, claim for indemnity against, 412.

BANKRUPTCY,

of landlord,

- when it determines tenancy at will, 432.

of tenant,

- commencement of, 300, *n.* (1).
- disclaimer of lease. *See* DISCLAIMER.
- distress* after commencement of, 299.
 - under attornment clause, 300. *See* DISTRESS.
- forfeiture on, relief against, 472, 475.
- leaseholds acquired after, 423.
- occupation by bankrupt tenant, effect of, 95.
- option to take lease, effect of bankruptcy on, 423.
- preferential debts in, 301.
- proviso for re-entry upon, 163.
- remedy of landlord* for rent upon, 298.
 - year's rent under 8 Ann. c. 14, 296.
- set-off in, 425.
- trustee in,*
 - assignment by, where covenant against assigning, 393, 423.
 - lease by, 73.
 - lease to, 74.
 - liability of, 423.
 - release of, 423.
 - vesting of leaseholds on, 423.

BEER, agreements compelling lessees to purchase from lessors, 339.
 exclusive right to supply, how enforced, 407.

BEST RENT,

- in lease by mortgagor or mortgagee in possession, under Conv. Act, 1882, 66, *n.* (c).
- in lease by tenant for life, 45.
- in lease under power, 54.

BEQUEST,

- of leaseholds, executor's assent to, 418.
- not breach of covenant not to assign, 393.

BILL OF EXCHANGE, payment of rent by, 215.

BILLS OF SALE ACTS, effect of, on power of distress, 221.

BISHOPS, leases by, 25, 27. *See* ECCLESIASTICAL CORPORATIONS.

BOND, in replevin, 285.

BOATS, liberty to ply with, on canal, 86.

BOUNDARIES,

jurisdiction to ascertain, 354.

obligation of tenant to keep up, 353.

BREACH OF AGREEMENT,

to let, remedies for, 113.

when committed, 113.

BREACH OF COVENANT. *See* COVENANT.

BREWER, covenant against business of, 336.

BROKER TO DISTRAIN. *See* BAILIFF.

BUILDING AGREEMENT,

effect of, 81.

specific performance of, 114.

BUILDING ESTATE,

covenant to make roads on, 154.

enforcement of restrictive covenants as to, 408.

BUILDING LEASE,

by ecclesiastical corporation, 29, 30.

tenant for life, 47.

effect of reservation of minerals in, 139.

of copyhold lands in Middlesex, registration of, 65.

repairing lease not good as, 53.

BUILDING SOCIETIES,

distress for rent due under mortgage to, 221.

leases by and to, 33.

“BURDENS,” effect of, in covenant to pay rates and taxes, 367.

BURNT DOWN, obligation to rebuild premises, 310, 313.

BUSHES,

exception of, 138.

property in, 355.

BUTCHER, covenant against use of premises for trade of, 335.

CANCELLATION OF LEASE, does not operate as surrender, 460.

CARRIAGES, at livery, whether they may be distrained, 233.

CARRIER, goods in hand of, for conveyance, not distrainable, 231.

CATTLE,

- distress of,
 - sale under, 277.
 - supply of food and water to, 267.
 - where to be impounded, 266.
 - when distrainable, 240.
 - at agistment, 240.
 - feeding on common, 244.
 - kept to consume produce sold by sheriff to be consumed on land, 237.
 - seen on demised premises, by landlord coming to distrain, 244.
- leases of, 377.
 - rights and liabilities of lessee and lessor, 377.
 - to whom cattle dying during term belong, 377.
 - young produced during term belong, 378.

CATTLE-PLAGUE RATE, one-half of, may be deducted from rent, 360.

CERTAINTY,

- as to amount of rent, 147, 220.
- commencement of lease, 141. .
- duration of lease, 143.
- of agreement, necessary for specific performance, 115.
- requisite in notice to quit, 442.

CESTUI QUE TRUST,

- lease by, to trustee, 73.
- notice to quit by, 444.
- when agent of trustee, 92.
- when tenant at will to trustee, 92.

CESTUI QUE VIE,

- evidence of life of, 143.
- proceedings for production of, 451.

“CHARGED UPON THE PREMISES,” effect of, in covenant to pay rates and taxes, 368.

CHARITABLE USES,

- leases by trustees for, 39, 40.
- to trustees for, 41.

CHARITY COMMISSIONERS, consent of, to leases of charity lands, 39.

CHARITY LEASE, setting aside, 40, 41.

CHATELS,

- leases of, 2.
- payments by way of rent reserved upon, 189.
- right to prehistoric, 139.

CHURCHWARDENS, distress by, 229.

CLOSE, meaning of, 129.

CLOVER, growing under standing corn, not to be sold by sheriff, 346.

COAL,

- agreement to take from specified colliery, 341.
- construction of covenants for payment of rent for, 208
- exception of, 140.
- liberty to stock, 86.

COFFEE HOUSE, covenant against use of premises as, 334.

COLLATERAL AGREEMENT, 104, *n.* (z), 123.

parol evidence of, 123.

COLLATERAL COVENANTS,

- what are, 406.
- do not bind assignee, 406.

COLLEGES, leases by, 27, 28, 32.

COLLIERIES, injunction to restrain working of, 344.

COMMENCEMENT OF LEASE,

- certainty as to, 141.
- construction of provisions as to, 141, 142.
- from what periods lease may be made to commence, 141, 142.
- from year to year, how to be ascertained, 438.
- to be fixed by memorandum of agreement, 106, 107.

COMMISSION, when payable to house agent, 71, *n.* (b).

COMMISSIONERS OF WOODS AND FORESTS, leases of crown lands vested in, 33.

COMMISSIONERS OF WORKS, leases by, 34.

COMMITTEES OF LUNATICS,

- leases by, 11, 12.
- renewal of leases by, 12.

COMMON, RIGHT OF, lease of, 120.

COMMON STAIRCASE, liability to repair, 310.

COMMON, TENANTS IN,

- action by, on covenants, 416, *n.* (i).
- action for rent by, 64.
- distress by, 228.
- ejectment by one, 524.
- lease by, 63.
 - to co-tenant, 63.
- liability of, to repair, 309, *n.* (g).
- payment of rent to, 197.

COMMONS, lease of, by lord of manor, 2, 64, *n.* (f).

COMPANY,

- director of, cannot distrain, 254.
- distress against, in winding-up, 302.
- distress by mortgagee, in winding-up, 304.
- indemnity against, in winding-up, 412, *n.* (x).
- lease of undertaking of, 39.
 - in trust for, 302.
 - to company, 38.
 - under power, 55.
- power of, to lease, 38.
- proviso for re-entry on winding-up of, 167.
 - exercise of, 467.
- trustee of lease for, 38.

COMPENSATION,

- express agreement for, 505, *n.* (f).
- for breach of covenant, 474.
- for improvements*, 502.
 - statutory, 502.
 - deduction of, from rent, 205.
 - as against mortgagee, 511.
 - in case of allotment, 509.
 - cottage garden, 510.
 - market gardens, 511.
 - recovery of, by under lessee, 112.
 - to outgoing tenant, by whom payable, 501.

COMPULSORY PAYMENTS, deduction of, from rent, 205.

CONCLUSION OF CONTRACT, 102.

CONCURRENT LEASE, 186.

- by ecclesiastical corporation, restrained, 28.

CONDITION.

- apportionment of, 417.
- forfeiture on breach of, 463.
- how created, 463.
- precedent, 155.
 - performance of covenant, when, 155, 501, *n.* (g).
 - valuation, when, 156, *n.* (u), 501.

CONFIDENTIAL RELATION, leases to persons standing in, 73.

CONFIRMATION OF LEASE,

- made by infant, 7.
 - married woman not under statute, 20.
 - spiritual corporation sole, 25.
 - tenant in tail, 43.
 - under power, 56, 57.

CONSENT,

- by landlord, to execution of improvements, 504.
- by tenant, to landlord's remaining on premises to sell distress, 280.
- to assignment. *See* ASSIGNMENT.

CONSIDERATION,

- for lease, 126.
- effect of misstatement of, 173.
- for sale of lease, 399 *n.* (n).

CONSTRUCTION,

- of agreements relating to course of husbandry, 347.
 - hay and straw, 348.
 - manure, 350.
 - trees, 356.
 - payment of taxes, 364.
 - underletting, 385.
 - game, 383.
- covenants against assignment, 392.
 - for quiet enjoyment, 371.
 - generally, 154.
 - prohibiting exercise of trades, 333.
 - relating to repairs, 311.
 - trading with particular persons, 339.
 - relating to working of mines, 341.
 - to insure, 357.
- exceptions and reservations, 136.
- powers of re-entry, 163.
 - to resume possession of part of premises, 169.
- reddendum, 146.
- stipulations as to time of payment of rent, 192.
- terms of description, 129.

CONSTRUCTIVE NOTICE of restrictive covenants, 408.

CONSUMPTION OF PRODUCE ON PREMISES, condition for, not allowed
on sale under distress, 277.

CONTINGENCY, lease for years, subject to, 99.

CONTINUOUS,

- breach of covenant, what is, 314, 359.
- effect on, of receipt of rent or other acknowledgment of tenancy, 471.
- easement, 133, 134, 135.

CONTRACT,

- conclusion of, 102, 103.
- for assignment. *See* ASSIGNMENT.
- for interest in land, damages for breach of, 87, *n.* (o), 113.
- requisites for validity of, 103.

CONVICT,

- property of, vests in administrator, 22, 428.
- leases of property of, by administrator, 22, 428.

CO-OWNER, 63. *See* JOINT TENANTS and COMMON, TENANTS IN.
distress for rent due from, 229.

CO-PARCENERS,

- action of ejectment by, 64.
- claim for rent by, 64.
- distress by one of several, 229.
- lease by, 64.

COPROLITES, liberty to get, 86.

COPYHOLD ENFRANCHISEMENT RENT CHARGE, deduction of, from rent, 204.

COPYHOLD TENANT, liability of, to repair, 308, *n.* (d).

COPYHOLDER, lease by, 64.

- licence for, by tenant for life, 48, 50, *n.* (l).
- effect of, when not under licence, 66.
- registration of, 65, 181.

CORN,

- claimable as emblements, 497.
- distress of, 234.
 - not to be removed to damage of owner, 278.
 - when to be sold, 281.
 - where to be impounded, 265.
- rents, construction of, 188 *n.* (b).
- sold by sheriff to be consumed on land, not liable to distress, 236.

CORNWALL, lease of land of Duchy of, 34.

CORPORATION,

- aggregate, lease to, 32.
 - by, to member, 32.
- common seal, when dispensed with, 23.
- compliance with statutory requirements in lease by, 24.
- delivery of lease under seal by, not necessary, 177, *n.* (x).
- description of, in lease, 24.
- ecclesiastical. *See* ECCLESIASTICAL CORPORATIONS.
- effect of covenant for quiet enjoyment in lease by, 375.
 - payment of rent by, 94.
- lease by agent of, 24.
 - by or to, how made, 23.
- liability of, for use and occupation, 23.
- municipal. *See* MUNICIPAL CORPORATIONS.
- notice to quit by steward of, 444.
- option of purchase in lease by, 24.
- power of, to take lease, 24.
- ratification of lease by agent of, 24.
- service of notice to quit on, 446.
- sole, lease to, 32.
- specific performance against, on ground of part performance, 23, 24.
- tenancy under, by payment of rent, 23, 94.

CORRESPONDENCE,

- contract by, 106.
- lease by, 125.

COSTS,

- of distress, 281.
 - bailiff to give copy of charges 282.
- of lease and counter part, 183.
 - how to be borne, 183.
 - Remuneration Order, 184.

COTTAGE GARDEN, compensation to tenant of, 510.

COUNTERPART,

- by whom executed and kept, 176.
- costs of, 183.
- effect of, where inconsistent with lease, 177.
- evidence of execution of, 176.
- execution of, usually required under statutory or other power of leasing, 176.
- presumptive evidence of execution of lease, 176.
- stamp on, 177.
 - on counterpart of agreement for lease, 118.
- time of execution of, 176.

COUNTY COUNCILS, power of, to let in small holdings, 37.

COUNTY COURT,

- action for double value in, 516.
 - recovery of land in, 526.
- of replevin in, 285.
 - registrar grants replevin, 285.
 - to recover possession after expiration of tenancy, 525.
- effect of agreement for lease in, 82.
- jurisdiction of, in unlawful distress on agricultural holding, 290.
 - in specific performance, 108, *n.* (c).

COUNTY RATES, construction of covenants relating to, 365.

COURT, leases by the, under Settled Estates Act, 1877, 51.

COURSE OF HUSBANDRY, construction of agreements relating to, 347.

COVENANT, action of, for rent, 305.

COVENANTS, 148.

- breach of, acquiescence in, 159.
 - compensation for, 475.
 - service of writ out of jurisdiction, 323.
 - when action can be brought for, 159, *n.* (v).
- collateral, 406.
- construction of, generally, 154.
- continuing, 314.
- dependent or independent, 155, 318.
- difficulty of performance of, 158.
- effect on, of compulsory purchase, 415.
- effect of merger on, 454.
 - surrender on, 461.

COVENANTS—*continued*.

- express, 148.
 - against assignment. *See* ASSIGNMENT.
 - against particular trades, 334.
 - underletting, 385.
 - as to cultivation of land, 347.
 - as to trading with particular persons, 339.
 - as to working of mines, 341.
 - by lessor not to withhold licence unreasonably, 395.
 - for payment of rent, 149.
 - for quiet enjoyment, 126. *See* QUIET ENJOYMENT.
 - for renewal, 162. *See* RENEWAL OF LEASE.
 - for title, in Ireland, 152.
 - to indemnify lessee on assignment of lease, 411.
 - insure against fire, 357.
 - leave in repair, 316.
 - pay rates and taxes, 364.
 - put into repair, 313.
 - repair, 311.
 - after notice, 317.
 - conditionally, 318.
 - yield up in repair, 316.
 - effect of, on removal of fixtures, 494.
 - yield up possession, damages for breach of, 513.
 - how constituted, 149.
 - implied, 126, 146, 149, 369.
 - in leases by mortgagor and mortgagee, 69, 70.
 - intended to be inserted in lease, when binding, 98.
 - joint or several, 156.
 - negative covenant, proviso for re-entry on breach of, 166.
 - parties to action on, 157.
 - positive, not binding by notice, 407.
 - enforcement of against mortgagee, 403.
 - "proper," 154.
 - restrictive, notice of, 408.
 - when binding in equity, 407.
 - lost by acquiescence, 344.
 - running with land, 404.
 - application of doctrine of, 403.
 - running with reversion. *See* REVERSION.
 - usual, 150. *See* USUAL COVENANTS.
 - against assignment, not usual, 150, 152, 153.
 - against particular trades, not usual, 153.
 - void for illegality, 158.
 - where assigns to be named in, 157.

CREDITOR'S DEED, effect of assignment in, 403.

CROPS,

- away-going, 498.
- growing, distress on, 234. *See* GROWING CROPS.

CROPS—*continued*.

- restriction on sale of, under execution, 346.
- what, claimable as emblements, 497.

CROWN,

- leases by, 33.
 - where rent reserved upon, is payable, 195.
- leases of private estates of, 33.
 - taken on behalf of, 33.
- no tenancy at sufferance against, 90.

CROWN DEBTOR, priority of extent against, over distress, 237.**CULTIVATION OF LAND,**

- lessee's obligations as to, 344.
- express agreements as to, 347.
- injunction to enforce agreement as to, 350.

CUSTODY OF LAW, goods in, cannot be distrained, 235.**CUSTODY OF LEASE,** who is entitled to, 183.**CUSTOM,**

- as to away-going crops, 498.
- compensation for tillages, 499.
- length of notice requisite to determine tenancy from year to year, 434.
- meaning of "Lady-day," 192.
- removal of articles erected by tenant, 486.
- rent becoming due in advance, 192.
- what trees are timber, 355.
- excluded by express agreement inconsistent with it, 346, 500.
- evidence of, when admitted to explain lease, 122.
- how established, 346.
- implied obligation of agricultural tenant to cultivate according to, 344.
- incorporation of, in lease, 346, 499.
- to leave away-going crops in barns, effect of, 250.
- to what tenancies applicable, 347.

DAMAGE FEASANT, cattle distrained, not distrainable for rent, 235.**DAMAGES,**

- in action for breach of agreement to let, 113.
 - breach of covenant for quiet enjoyment, 377.
 - to repair, 322.
- illegal distress, 288.
 - circumstances of mitigation, 289.
- irregular distress, 291.
- use and occupation, 306.
- in lieu of specific performance, 116.
- in replevin, 284.
- liquidated, 159.
- measure of, for breach of covenant, 323.
- power of High Court to award, 116.

- DATE,**
 of lease by deed, 125.
 presumption of date of delivery, 125.
- DEAD RENT, 147.**
- DEAN AND CHAPTER,** leases by, 27.
- DEATH,**
 of landlord or tenant, effect of, on tenancy at will, 433.
 lessee, 418.
 liability of executor for rent and upon the covenants,
 420.
 lessor, 417.
 recovery of arrears of rent due at, 226.
- DECLARATION** under Lodger's Goods Protection Act, 1871...242.
- DEDUCTIONS FROM RENT,**
 compensation under Agricultural Holdings Act, 1883...205.
 compulsory payments, 206.
 copyhold enfranchisement rent charge, 204.
 effect of memorandum allowing, 146.
 land tax, 202.
 local improvement rates, 203.
 permitted by mistake, effect of, 202.
 property tax, 201.
 rent due to original landlord, 205.
 sewers' rate, 203.
 tithe rent-charge, 204.
- DEED,**
 delivery of, mode of, 178.
 as an escrow, 178.
 execution and attestation of leases by, 177.
 presumption of date of delivery of, 125.
 when lease must be by, 118.
- DEFECTIVE EXECUTION OF POWER,** relief against, 56, 57.
- DEFECTIVE STATE OF PREMISES,** liability to stranger for, 311.
- DEMAND,**
 of rent,
 before distress, 257.
 re-entry, 465.
 how and when to be made, 466.
 when dispensed with, 466.
 where to be made, 466.
 not necessarily a waiver of notice to quit, 448.
 when a waiver of forfeiture, 469.
 of possession or double value, 514.
- "DEMISE,"** as implying covenant for quiet enjoyment, 126.

DEPOSIT OF LEASE AS SECURITY,

liability of deposittee, 402.

not a breach of covenant against assignment, 393.

DESERTED PREMISES, proceedings before justices for recovery of, 530.**DESTRUCTION OF PREMISES**, rent payable notwithstanding, 207.**DETERMINATION OF LEASE,**

modes of, applicable to particular kinds of tenancy, 430.

determination of tenancy at will, 431.

by sufferance, 430.

for life, 451.

for optional term, 450.

from year to year, 433.

modes of, generally applicable, 452.

forfeiture, 462.

merger, 452.

surrender, 454.

parol agreement for, 455.

when distress may be made after, 250.

"DETERMINATION OF TENANCY," under Agricultural Holdings Act, 1883, time of, 507, *n.* (s).**DIFFICULTY OF PERFORMANCE** of covenant, 158.**DIGNITIES** cannot be granted for years, 3.**DISABILITY**, restrictions arising from, 3.**DISABLING STATUTES** not to prevent lease with consent of Charity Commissioners. 41.**DISCLAIMER,**

of lessors' title,

determination of tenancy on, 449.

forfeiture on, 462.

of lease by trustee in bankruptcy, 423.

affects entire property in demise, 424.

effect of, 424.

extension of time for, 427.

leave to disclaim, 425.

when required, 425.

notice of, 426.

proof for damages on, 428.

terms of, 426.

vesting order on, 427.

DISCLOSURE, duty of, on sale of lease, 398.**DISCOVERY**, to establish forfeiture not allowed, 465.**DISSENTING MINISTER**, tenant at will under trustees, 91.

DISTRESS,

- abandonment of, 268.
- after determination of tenancy, 469, 470.
- agreement against, effect of 218.
- amount for which made, 252.
 - greater than rent due, 252.
 - six years' arrears only recoverable, 253.
- appraisement, when now necessary, 274.
 - stamp on, 275.
- appraisers, sale to, 279.
- authority for, 225.
- bankruptcy, distress in, 298.
 - discharge of bankrupt tenant does not affect right of distress, 301.
 - forbearance of trustee from, under arrangement in bankruptcy, 299.
 - for rent accruing, due after bankruptcy, 301.
 - before bankruptcy, 298.
 - statutory restriction on, 300.
- costs of, 281.
- estoppel by submission to, 78.
- entry under*,
 - constructive, 259.
 - how made, 257.
 - when outer door may be broken open, 258.
- exemption from, 230. *See* DISTRESS, goods privileged from.
- excessive*, 260.
 - action for, 261.
 - on goods of stranger, 262.
 - when distress excessive, 262.
- fraudulent removal of goods to avoid. *See* FRAUDULENT REMOVAL.
- goods liable to*, 229.
 - corn or hay, 234.
 - growing crops, 234.
 - strangers' goods, 230.
 - remedy of stranger, 218.
 - when not allowed, 218, 222.
- goods absolutely privileged from*, 230.
 - ambassador and his servants, goods of, 239.
 - auctioneer, goods delivered to, 232.
 - carrier, 231.
 - cattle in or on way to market, 233.
 - custody of law, things in, 235.
 - electric lighting apparatus, 239.
 - factor, goods delivered to, 232.
 - fixtures, 230.
 - frames, materials, etc., entrusted to workmen, 238.
 - furniture sent to a repository, 233.
 - gas meters and fittings, 239.
 - growing crops sold by sheriff,
 - except as to rent accruing after sale, 237.

DISTRESS—*continued.**goods absolutely privileged from—continued.*

guests at an inn, goods of, 131.

hired agricultural machinery, 238.

hired breeding stock, 238.

keys, 230.

railway rolling stock, 239.

restored, things which cannot be, 233.

sheriff,

goods in possession of, 236.

possession must be continuous, 236.

produce sold by sheriff subject to agreement to consume
on land, 236.

purchaser from, goods in possession of, 235.

straying cattle, 237.

title deeds, 230.

trade,

goods sent in way of trade, 230, 232.

privilege depends on delivery, 233.

use, things in actual, 234.

water meters and pipes, 239.

wearing apparel, bedding, and tools, to £5, 238.

wild animals, 235.

wine sent to warehouse, 232.

goods conditionally, privileged from, 240.

agisted cattle, 240.

cattle and sheep, 240.

growing crops sold under execution, 241.

implements of trade, 240.

lodger's goods, 241.

growing corn, on, 234.

impounded goods, injuries to, 267.

impounding, under, 263.

charges for, in public pound, 282.

continuance of, 268.

goods not to be used, 267.

of cattle, 266.

supply of food and water to, 267.

of corn, straw, or hay, 265.

of furniture, 264.

of growing crops, 266.

on premises, 264.

rescue or poundbreach, 268.

tender of rent after, 272.

before, 272.

what constitutes, 264.

law of, not to be extended, 233.

limitation on,

generally, 253.

in agricultural holdings, 253.

DISTRESS—*continued.*

- mode of making*, 254.
 - certificated bailiff to levy, 254.
 - demand of rent, 257. *See* DEMAND.
 - notice in general not necessary for, 222.
 - for penal rent, notice necessary, 222.
 - warrant of, 255.
 - when police may be called in, 255.
- "order and disposition" clause, effect of distress on, 218.
- plea of, in action for rent, 306.
- power of,
 - common law power of, not excluded by express power, 252.
 - express, 221.
 - under attornment clause in mortgage, 83.
- preferential debts, a first charge on goods, 301.
- re-entry, proviso for, where no sufficient distress, 168, 169.
- relief against, in equity, 219.
- remedy by, extinguished by judgment for rent, 217.
- remedy*, for illegal, 282.
 - on privileged goods, 282, 289.
 - goods not on demised premises, 282.
 - where no rent due, 288.
 - summary, 289.
- for irregular, 290.
- removal of goods under, 280.
 - goods not in inventory, 260.
- rent payable in advance, 222.
- requisites to,
 - certain and proper rent, 219.
 - rent fixed or ascertainable with certainty, 220, 221.
 - rent in arrear, 222.
 - reversion in person distraining, 222.
 - by estoppel sufficient, 223.
- right of, 217.
 - postponement of, 219, 252.
- sale under*, 269, 276.
 - action for not selling for best price, 277, 290.
 - selling before the proper time, 279, 290.
 - how long landlord may remain on premises for purpose of selling, 269, 276, 280.
 - inventory, 270.
 - must not be subject to condition, 277.
 - notice of, 270.
 - service of, 272.
 - of growing corn, 281.
 - of hay and straw prohibited from being carried off the premises, 277.
 - order of sale of goods, 277.
 - postponement of, 280.
 - requisites to, 269.

DISTRESS—*continued.**sale under—continued.*

right to enter and remove goods sold, 278.

surplus proceeds of, 281.

to whom it may be made, 279.

to appraisers, 279.

not to landlord, 299.

when not at best price, 277.

when to be made, 279.

where to be made, 278.

second, for same rent, 262, 263.

seizure under, 259.

how made, 259, 260.

requisites to, 260.

must not be excessive, 260.

sufficient should be taken under, 262.

tender of rent after seizure, but before impounding, 272.

before seizure, 257.

sham, to defraud execution creditor, 281.

sufficiency of, test of, 240.

surrender of mesne lease, after, 223.

suspension of right of, 218.

time for making, 220, 250.

statutory extension of, 250, 251.

time of day for making, 251.

when a waiver of forfeiture, 469.

notice to quit, 448.

where to be made,

general rule, 243.

exceptions,

cattle seen on demised premises, and then driven off, 244.

goods fraudulently removed, 245. *See* FRAUDULENT REMOVAL.

stock feeding on common, 244.

under express power, 244.

who may distrain,

bailiff, ratification of distress by, 255.

churchwardens and overseers, 229.

co-parceners, 229.

executors and administrators. *See* EXECUTORS.

husband as tenant by the curtesy, 227.

in respect of wife's property, 227, 228.

joint tenants, 228.

married woman, 227.

mortgagee, under lease by mortgagor before mortgage, 196, 224.

after mortgage, 224.

mortgagor, under lease by him before mortgage, 224, 225.

after mortgage, 224, 225.

DISTRESS—*continued.**who may distrain*—*continued.*

- not assignor after assignment, 222.
- mortgagee after assignment, 223.
- real representative, 227.
- receiver. *See* RECEIVER.
 - appointed out of court, 225.
- tenant by elegit, 229.
- tenant from year to year, 228.
- tenants in common, 228.
- used, goods distrained, not to be, 267.
- winding-up, in, 302: *See* WINDING-UP.
- withdrawal of, 263, *n.* (b).
 - on misrepresentation, 295.

DISTRICT COUNCILS, leases by, 35.

DISTRICT RATE, liability for general, 362.

DITCHES, ownership of, 354.

DOCUMENT “under hand only,” stamp on, 117.

DOMESTIC UTILITY, articles of, whether fixtures, 490.
removal of, 491.

DOOR,

- inner, may be broken open to distrain, if outer door is open, 258.
- outer, when it may be broken open, 245, 257.

DOUBLE RENT,

- action or distress for, 517.
- when it ceases to be payable, 518.

DOUBLE VALUE,

- action for, 514.
 - notice before, 515.
 - when it lies, 515.
 - who can bring, 516.
- how calculated, 516.
- no distress for, 516.
- waiver of claim to, 516.

DRAINAGE, custom to charge to landlord, 499.

DRAINS, covenant to repair, 312.

DUCHY OF CORNWALL, leases of lands belonging to, 34.

DUCHY OF LANCASTER, leases of lands belonging to, 34.

DUPLICATE OF LEASE, 177.

- stamps upon, 177.

DURATION OF LEASES, certainty as to, 143.

DURESS, lease under, 74.

“DUTIES,” effect of, in covenant to pay rates and taxes, 367.

DWELLING HOUSE, covenant against erection of, 338, *n.* (t).

EASEMENTS,

- continuous, 133, 134, 135.
- implied grant of, 135, 136.
 - reservation of, 135.
- what pass on demise, 132.

ECCLESIASTICAL CORPORATIONS,

- leases by, 25.
 - building lease, 29, 30.
 - easements, of, 30.
 - mining leases, 30.
- renewal of leases by, 31.
- restrictions on leases by, 27.
 - concurrent leases, 28.
- sole, confirmation of lease by, 25.

ECCLESIASTICAL PERSONS, leases to, 32.

ECCLESIASTICAL PROPERTY, restrictions on letting of, 31.

EJECTMENT, effect of commencement of, for forfeiture, 470.

EJUSDEM GENERIS, rule of, 495.

ELEEMOSYNARY CORPORATION, lease by, 27.

ELEGIT, tenant by,

- distress by, 229.
- lease by, 70.

EMBLEMENTS,

- continuance of tenancy substituted for, 498.
- entry to take, 497.
- what may be claimed as, 497.
- when they may be claimed, 497.
- who entitled to, 497, 498.

ENABLING STATUTE, the, 26.

ENCROACHMENTS,

- action in respect of, 514.
- application of rule as to, 513.
- landlord's title to, 129, 513.

ENDOWMENT OF SEE, leases of lands assigned as, 31.

ENROLMENT of leases by tenants in tail, where necessary, 43.

ENTRY,

- as act of part performance, 110.
- by executor or administrator of tenant, effect of, 420, 421.
 - landlord
 - at end of tenancy, to recover possession 518.

ENTRY—*continued.*by landlord—*continued.*

- where premises are abandoned, 518.
- locked up, 518.
- tenant is in possession, 518.
- for forfeiture, 464.
- to distrain, 257.
 - constructive entry, 259.
 - effect of unlawful entry, 258, 282.
 - in case of fraudulent removal, 245.
 - when outer door may be broken open, 245, 258.
- right of, when barred, 519. *See* STATUTE OF LIMITATIONS.
- to repair, 321.

by tenant

- between quarter days, 440.
- effect of, 185.
- nature of lessee's interest until, 185.
- necessary to enable him to maintain trespass, 186.
 - landlord to maintain use and occupation against him, 187.
- on different parts of premises at different times, 440.
- to perfect lease, 186.
- under agreement for lease, 91.
 - parol agreement for lease, 110.
 - purchase agreement, 91.
 - void lease, 91.

EQUITY, courts of,

- application to, for injunction against waste, 329.
- relief against forfeiture, 476.
- specific performance of agreement for lease, 114.

ERROR in notice to quit, 441.**ESCROW**,

- agreement made as, 108.
- delivery of deed as an, 178.

ESTOPPEL,

- available in all actions, 76.
- by attornment, 82.
 - payment of rent, 78.
 - tenancy, 75.
- duration of, 76, 77.
- feeding the, 75.
- in whose favour available, 76.
- leases by, 74.
- mutuality of, 76.
- not where interest passes, 77.
- on reservation of rent to stranger to reversion, 191.
- resulting from part performance, 24.

ESTOPPEL—*continued*.

- reversion by, sufficient to support distress, 223.
- tenancy by, 427, *n. (o)*.
- tenant estopped from disputing title of landlord, 74.
 - may show that it has expired, 77.
- upon whom binding, 76.
- when estoppel not absolute, 77, 78.

ESTOVERS, right of tenant to take, 355.

EVICTION,

- by title paramount, 210.
 - apportionment of rent upon, 212.
 - as defence to action for rent, 209.
- of tenant by landlord,
 - constructive, 211.
 - effect of, on covenants, 209.
 - liability for rent, 209, 210.
 - from part of premises, 209.
 - what acts constitute, 209.
 - reletting premises, 210.

EVIDENCE,

- extrinsic or verbal, when admissible to explain lease, 121.
- terms upon which unstamped instruments are received in, 175.

EXCEPTED PREMISES, right of selecting, 138.

EXCEPTION,

- construction of, 137.
- difference of, from reservation, 136.
- extent of, 139.
- of bushes, 138.
 - liberty to tenant to kill rabbits, 383. *See* RESERVATION.
 - mines and minerals, 139, 140.
 - trees, 138, 139.
 - woods and underwoods, 138.

EXCESSIVE DISTRESS,

- tenant's remedy for, 261.
- what seizure is excessive, 262.

EXCHANGE between tenants, effect of, 459.

EXCLUSIVE POSSESSION, necessary for lease, 84.

EXECUTION AGAINST TENANT,

- forfeiture on, 475.
- goods taken in, cannot generally be distrained, 235.
- growing crops seized under, liable to distress for subsequent rent, 237.
- hay, grass, &c., not to be sold off, contrary to covenants, 350.

EXECUTION AGAINST TENANT—*continued*.

- landlord's right to one year's rent before removal of goods under, 291.
- Admiralty court in, 298.
- county court, in, 296.
- duty of sheriff, 293, 294.
- damages against, for removing goods without satisfying, one year's rent, 295.
- sheriff to give notice of seizure of produce to landlord, 351.
- straw, turnips or manure taken under, not to be sold off, 350.
- taking of fixtures under, 296.
- tenant to give notice of covenants to sheriff, 351.

EXECUTION OF LEASES,

- by agents, 72.
- by deed, 177.
- effect of alterations in lease after execution, 179.
- non-execution by lessor, 179.
- under powers of leasing, 58.

EXECUTORS,

- lease by, 60.
- as real representatives, 62.
- before probate, 61, 62.
- by one of several, 61.
- of lessee,
 - action for use and occupation against, 422.
 - assent of, to specific bequest of lease, 418.
 - assignees, liability of, as, 420.
 - assignment by, 422.
 - avoidance of liability by, 421, 422.
 - liability of*, for rent and breaches of covenant, 420, 421..
 - only after entry, 420.
 - for neglect to insure, 423.
 - summary of law as to, 421.
 - refusal of lease by, 419.
 - reservation of rent to, 148.
 - setting aside fund for future claims, 422.
 - specific performance against, 116.
 - of covenant to take renewed lease, 421.
- of lessor,
 - action by, on covenant broken in lessor's lifetime, 418..
 - distress by*, 226.
 - before probate, 227.

EXPENDITURE, as act of part performance, 110.

EXPENSES, of lease, 183. *See* COSTS.

EXTENT against Crown debtor, priority of, over distress, 237.

EXTRINSIC EVIDENCE, when admissible, 121.

FIXTURES—*continued*.

property in, 479.

under express agreement, 494.

recovery of value of, 494.

removal of,

articles of domestic utility, 491.

ornament, 491.

by mortgagee of tenant, 461.

construction of particular covenants as to, 495.

damages for wrongful, 494.

surrender, effect of, on right of removal, 493.

time for, 492.

under agreement in lease, 493.

when a breach of covenant, 496.

remove,

licence to, 493.

right of tenant to, 484,

under express agreement, 494.

tenant's fixtures, articles recognized as, 491, *n.* (y).

trade. *See* TRADE FIXTURES.

what are, 230, 479.

whether passing under new lease, 494.

FLAT,

restraining improper use of, 408.

right to employment of porter for, 88.

right to gas under lease of, 88.

FLINTS, custom to take away and sell, 139, 347.

FOOD, supply of, to animals impounded, 267.

FORCIBLE ENTRY, 518.

damages for, 519.

indictment for, 518.

proviso for, void, 165.

FORESHORE, leases of, 33.

FOREST OF DEAN, lease of land in, 34.

FORFEITURE, 462.

action for, effect of, 467.

causes of,

assignment without licence, 463.

breach of condition annexed to grant, 463.

construction of forfeiture clause, 463

copyholds, letting of, without licence, 66.

disclaimer, 462.

acts amounting to, 462.

land brought into mortmain, 24.

under proviso for re-entry, 464. *See* PROVISIO FOR RE-ENTRY.

proof of, 465.

FORFEITURE—*continued*.

relief against. *See* RELIEF AGAINST FORFEITURE.

waiver of. *See* WAIVER.

on continuing breach of covenant, 471.

where no sufficient distress, 463.

who can enforce, 464.

FORMAL CONTRACT, agreement subject to, 103.

FORMS. *See* TABLE OF FORMS.

FORTHWITH, to put premises into repair, construction of covenant, 313.

FOUR-COURSE SYSTEM, meaning of covenant to farm on, 347.

FRAME, entrusted to workman, not distrainable by his landlord, 238.

FRAUD, parol agreements for lease enforceable on ground of, 104.

FRAUDS, STATUTE OF, effect of requirement of writing under, 104.

FRAUDULENT REMOVAL,

action for, plaintiff cannot interrogate in, 249.

complaint before justices as to, 246.

landlord may seize within 30 days, 245.

unless goods *bonâ fide* sold, 245.

penalty on person assisting in, 246.

power to break open houses, 245.

seizure of goods on, requisites to, 247.

existing tenancy, 247.

goods must be tenant's, 247.

fraudulent intent, 248.

rent due, 249.

what constitutes, 248, 249.

FRIENDLY SOCIETIES, leases by and to, 38.

"FROM," construction of, in commencement of term, 142

"FROM HENCEFORTH," lease to commence, 142

FRUIT, meaning of, in relation to trees, 138.

FULL COSTS, recovery of, 288, 291.

FURNISHED HOUSE,

condition of fitness as to, 332.

breach of, 332.

liability of landlord for rates of, while unlet, 362.

FURNISHED LODGINGS,

agreement for letting, 104.

rent for

cessation of, on fire, 207.

distress for, 190.

FURNITURE,

- distrained for rent, where it may be impounded, 264.
- removal of, in metropolis, to avoid distress, 249.

FUTURE LEASE, 185.**GAME,**

- agreement to keep down, 383.
- construction of demise or reservation of right of shooting, 382.
 - special agreements relating to, 383.
- excess of, 383.
- licensee to kill, under tenant, 380.
- penalty for trespassing in pursuit of, 380.
 - wrongful killing by occupier, 379.
- persons authorized to kill, 379, 380.
- reservation of, to landlord, 378.
 - how effected, 380.
- statutory definition of, 379.
 - provisions as to, 379.
 - Ground Game Act, 1880...381.

GAMES OF CHANCE, covenant against, 338, *n.* (p.)**GARNISHEE ORDER, attachment of rent under, 198.****GAS-METER, not a fixture, 483.****GOODS,**

- leases of, 3.
- liable to be distrained, 229. *See* DISTRESS.

GRANT OF REVERSION,

- grantee may avail himself of notice to quit given by preceding owner, 443.
- remedies of grantees and lessees upon, 413, 414.

GREENHOUSE, when removable by tenant, 481, 486.**GROWING CROPS,**

- distress of, 237.
 - appraisement of, 275.
 - impounding of, 266.
 - sale, 281.
 - tender of rent before crops gathered, 274.

GROUND GAME,

- meaning of, 381.
- occupier's statutory right to kill, 381.
 - limitation on right, 381.
 - restrictions on exercise of right, 382.
 - right inalienable, 381.

GUARANTEE FOR RENT,

- action on, 306.
- effect of notice to quit on, 448.

GUARDIAN,

- lease by, 8, 9.
- lease to, by ward, 73.

HABENDUM,

- certainty as to commencement and duration of lease, 141, 143.
- construction of, 141.
- for life, form and construction of, 144.
- years, form and construction of, 141.
- from what time it takes effect. 143.
- year to year, form and construction of, 144.
- office of the, 140.

HABITATION; condition that house is fit for, what is breach of, 332.

HARDSHIP, as defence to specific performance. 115.

HAY,

- construction of agreements relating to, 348.
- distress on, 234.
 - sale on condition that purchaser shall consume on premises, 277.
 - where to be impounded, 265.
- taken in execution, not to be sold off contrary to covenants, 350, 351.

HEADLEASE, duty of underlessee to examine, 112.

HEDGE,

- destruction of quickset, waste, 325.
- ownership of, 354.
- where none between adjoining fields, obligations of occupiers, 352

HOLDING OVER,

- after determination of term. penalty for, 514.
- notice to quit by tenant, 517.
- by co-lessee, 513.
 - mesne tenant, effect of, on sub-tenancy, 95, *n.* (o).
 - under tenant, 512.
 - yearly tenant, 439.
- forfeiture during, 465.
- landlord's remedies against tenant, 514.
- pending treaty for new lease, 92.
- with payment of rent, effect of, 95.

HONOURS, cannot be granted for years, 3.

HORSES, when distrainable, 231, 240.

- at livery, may be distrained, 233.

HOSPITAL,

- lease by master of, 27.
- whether a business, 334.
 - offensive business, 337.

HOTHOUSES, removal of, 486, 491.

HOUSE,

unfurnished, no implied contract by lessor that it is fit for habitation, 331.

what the term may comprehend, 130.

may pass as appurtenant to, 133.

HOUSE AGENT,

claim to commission by, 71, *n.* (b).

duty of, in finding tenant, 71.

yearly licence to be taken out by, 71.

HULK, liberty to fasten to moorings, 86.

HUNT, grant of leave to, does not give grantee liberty of shooting, 382.

HUSBANDRY,

cultivation according to, 345.

express agreements as to course of, 347.

HUSBAND, leases by, 17.

HUSBANDLIKE CULTIVATION, what is to be considered as, 344, 348.

ILLEGAL DISTRESS,

remedies for, 282.

action, 288.

replevin, 283.

rescue, 283.

summary, 289.

agricultural holdings, 289.

metropolitan police district, 289.

what is, 251, 258, 282.

ILLEGAL OR IMMORAL PURPOSES, rent or damages not recoverable under leases for, 330.

ILLEGALITY, covenant void for, 158.

IMPLEMENTS OF TRADE, distress of, 234, 240.

IMPLIED COVENANTS,

upon the word "demise," 126, 369, 370.

words "yielding and paying," 146.

IMPOUNDING. *See* DISTRESS.

IMPROVEMENT RATE, deduction of, from rent, 203, 361.

IMPROVEMENTS, compensation for. *See* COMPENSATION.

under Agricultural Holdings Act, 1883...502.

INCLOSURE, recovery of possession of land required for, 527, *n.* (s).

INCOMING TENANT, liability of, to pay for tillages, 501.

INCONSISTENT RELATION, creation of, an implied surrender, 459.

INCORPOREAL HEREDITAMENTS,

agreement for lease of, 104.

covenants running with reversion on term in. 415

effect of enjoyment of, 121.

leases of, 2.

how to be made, 120.

no reservation of rent out of, 146.

reservation of, 137.

sum reserved as rent on lease of, 189.

INCREASED RENT, 199.

effect of agreement for, 458.

lessee's rights on payment of, 199.

option to stay on at, 442.

INCUMBENT,

abolition of common law leasing power of, 30.

leases of glebe by, 29.

leases to, 32.

INCUMBER, covenant not to, 394.

INDEFINITE GRANT, effect of, 143.

INDEFINITE LETTING, effect of, 92, 143.

INDEMNITY, COVENANT OF,

to bailiff on distress, 256.

upon assignment of lease, 411.

damages in action on, 412.

INDUSTRIAL SOCIETIES, leases by and to, 38.

INFANTS,

leases by, 3.

agent of, 8.

not in pursuance of statute, 6.

avoidance of lease by, 6, 7, 8.

confirmation of lease by, 7, 8.

recovery of rent, 8.

under custom of gavelkind 6.

under statute,

under Infants' Property Act, 1830...5.

the Settled Estates Act, 1877...5.

Settled Land Act, 1882...4, 5.

application to Court, 48.

when infant of unsound mind, 13.

leases to, 10.

avoidance of, 10, 11.

liability for rent, 10, 11.

recovery of premium by, 11.

specific performance not ordered against, 116.

renewal of lease by, 6.

to, 9.

to co-owner with. 74.

INJUNCTION,

- against improper user of land, 333.
 - use of premises in breach of covenant, 343.
 - waste, 329.
- in aid of agreement, 116.

INN, goods of guests at, not distrainable, 231.

INSPECTION OF LEASE, by lessee, 183.

INSURANCE,

- breach of covenant as to, 358.
 - damages for, 358.
- construction of general covenant as to, 357.
- covenant to insure in names of specified persons, 358.
 - in office to be named by lessor, 359.

INSURANCE MONEYS,

- right to, under option of purchase, 161.
- when to be applied in rebuilding, 359.

INSURE,

- covenant by lessee to, not usual, 153.
 - continuing breach of, 359, 471.
 - does not exclude liability under covenant to repair, 313.
 - runs with the land, 360, *n. (x)*, 405.

INTENDED LESSEE, rights of, under agreement for lease, 111.

INTERESSE TERMINI, 185, 186, 462.

- how and when it may be perfected, 186.
- nature of lessee's interest before entry, 185.

INTEREST,

- in land, within sect. 4 of Statute of Frauds, 61.
- on rent in arrear, 307.
 - effect of agreement to take, 215.

INTOXICATION, lease made by person in state of, 74.

INVENTORY, before sale under distress, 270.

INTERPLEADER, payment of rent out of goods sold in, 296.

INTERROGATORIES, to establish forfeiture, 465.

INTESTACY, vesting of real estate upon, 62.

IRREGULAR DISTRESS,

- action for, 290.
 - measure of damages in, 290, 291.
 - not maintainable without proof of actual damage, 291.
 - tenant not to recover if tender of amends is made, 291.
- when distress is irregular, 290.

JOINT AND SEVERAL, covenants whether, 156.

JOINT DISTRESS for separate rents under one deed, 243.

JOINT LESSEE,

- liability of estate of, 422, *n.* (q).
- notice to quit in case of, 446.

JOINT TENANTS,

- distress by, 228.
- effect of severance of reversion, 228.
- leases by, 63.
 - benefit of covenant in, 157.
 - by one of several, 63.
 - to co-tenant, 63.
- notice to quit by, 444.
- payment of rent to, 197.

JUSTICES,

- appeal from, to judge of assize, 531.
- mandamus to, to deliver possession, 531.
- proceedings before, for recovery of deserted premises, 530.
 - small tenements, 527.
 - before metropolitan police magistrates, on wrongful distress, 289.

KEYS,

- as fixtures, 484.
- delivery and acceptance of, an implied surrender, 455.
 - what is evidence of acceptance of, 456.
- demand of, by landlord, determines tenancy at will, 431.
- detention of, not necessarily waiver of notice to quit, 448.

LADY DAY, custom as to meaning of, 192.

LANCASTER, lease of land of Duchy of, 34.

LAND,

- action for recovery of*,
 - in County Court, 526.
 - in High Court, 523.
 - judgment in, 525.
 - procedure in, 524.
 - service of writ out of jurisdiction, 524.
 - notice of, by tenant to landlord, 525.
- agreement partly relating to, 104.
- covenants running with. *See* COVENANTS.
- fitness of, for use intended, no implied contract for, 332.
- husbandlike cultivation of, obligation as to, 344.
- meaning of, 129.
 - statutory definitions of, 4, *n.* (b), 5, *n.* (s).
- rights included in lease of, 134.
- usually demised, power to lease, 53.

LAND AGENT, power of, to lease, 71.

LANDLORD,

- and tenant, relation of, how created, 79.
- entry by, to execute repairs, 321.
- goods distrained cannot be sold to, 279.
- how far bound to disclose to intending lessee condition of premises, 331.
- letting premises in dangerous condition, liability for, 311.
- notice to, of want of repair, 321.
- obligations of, as to repairs, 309.
- remedy of, where goods removed under execution, 295.
- title of, estoppel in favour of, 75.
 - forfeiture by disclaimer of, 462.
 - tenant may show expiry of, 77.

LANDS CLAUSES ACT, discharge of covenants where land taken under, 415.

LAND TAX,

- construction of covenants relating to, 365.
- deduction of, from rent, 202, 360.
- tenant liable to pay, under reservation of net rent, 148.

LATENT AMBIGUITY, parol evidence admissible to explain, 122.

LEASES, 118.

- agreements for, 102. *See* AGREEMENT FOR LEASE.
- avoidance of, on illegal user of premises not permitted, 331.
- by estoppel, 74. *See* ESTOPPEL.
- concurrent, 186.
- duration of*, 143.
 - determinable within the term, 143.
 - for indefinite term, 143.
 - life. *See* LIFE, LEASE FOR.
 - three years, how reckoned, for Statute of Frauds, 118.
 - years,
 - certainty required in, 99.
 - option of further term, 100.
 - to determine, 99.
 - subject to contingency, 99.
 - from year to year, 93.
 - in perpetuity, not possible, 99.
- effect of alterations in, 179, 180.
- instrument void as a lease, 119.
- form and construction of*, 124.
 - by correspondence, 125.
 - ordinary form, 125.
 - covenants, 148. *See* COVENANTS.
 - habendum, 140. *See* HABENDUM.

LEASES—*continued.**form and construction of—continued.*ordinary form—*continued.*

premises, 125.

consideration, 126.

date, 73.

operative words, 126

parcels, 126.

recitals, 126.

reddendum, 146.

proviso for re-entry, 163. *See* PROVISIO FOR RE-ENTRY.

statutory form, 125.

future, 185.

how to be made,

by parol, 118, 119.

effect of unsealed lease for more than three years, 119.

when deed is necessary, 118.

in possession, 55.

in trust for company, 38.

inspection of, on sale, 398.

instrument when construed as, 86.

matters relating to completion of, 177.

attestation, 179.

costs of, 183.

by whom payable, 183.

custody of, 183.

right of landlord to inspect lease, 183.

occupier to inspect lease, 183.

entry of lessee. *See* ENTRY.

execution,

delivery, 178.

failure of lessor to execute, 179.

mode of, 177.

signature, 178.

memorandum added to, effect of, 180.

of what kinds of property may be made, 2, 3.

of incorporeal hereditaments, 69.

how to be made, 120.

mines, 127.

option to determine, 162.

persons capable of making and taking, 2.

power to resume possession of part of premises, 169.

power, under, 52. *See* POWER.

rectification of, 187.

setting aside, 187, *n.* (p).stamp upon, 170. *See* STAMP.

lease subsequent to agreement, 117.

LESSEE,

- agreement to sublet by, where restriction on subletting, 112.
- deemed surety to lessor for assignee, 410.
- devolution of term on death of, 418.
- indemnity* to, by assignee, 411.
 - damages on, 412.
- liability of*, effect of assignment on, 410.
 - for not taking possession, 118, *n.* (f).
- rights of intended, 111.
 - production of lessor's title, 111.
 - statutory restrictions on, 111, 112.

LESSOR,

- covenant by, when binding on remainderman, 96.
- effect of non-execution of lease by, 179.
- recovery of arrears of rent due at death of, 226.
- right of, to vesting order on disclaimer, 427.

LETTERS, contract by, 102, 106.

LETTING, tenancy at will implied from general, 92.

LEVEL, meaning of, in mining lease, 122.

LIABILITY,

- of executors or administrators of lessee, 420.
 - landlord for acts of bailiff employed by him to distrain, 255.
 - lessee for breaches of covenant, when it commences, 319.
 - cannot rid himself of, by assigning lease, 410.

LIBRARY AUTHORITY, lease to, 35.

LICENCE,

- by lord of manor to lease, 65.
 - lease under, 65.
- determined by assignment of subject, 86, 87.
- distinguished from letting, 84.
- effect of, 86.
- estate not conferred by, 86.
- instances of, 85, 86.
- in writing, 394, *n.* (g).
- stamping, 84, *n.* (l).
- sums reserved on, 190.
 - no distress for, 86.
- to assign*,
 - duty of vendor to procure, 396.
 - effect of, restrained to assignment, &c., actually authorized, 397.
 - payment for, 396.
 - presumption of, 343.
- to quit, effect of parol, 456.
- to remove fixtures, 493.
- when assignable, 87.
 - exclusive, 85.
 - revocable, 87.

LICENCE, PUBLIC HOUSE,

- construction of covenants relating to, 339, *n.* (d).
- covenant against forfeiture of, 339.

LIFE,

- leases for*, 100, 125.
 - construction of, 144.
 - determination of, 451.
 - different kinds of, 100.
 - how made, 100, 125, 144, 145.
 - production of persons for whose lives estates are held, 451.
 - to commence *in futuro*, 144.
- tenant for*,
 - adoption by, of contract of predecessor, 47.
 - bankrupt, lease by, 70, *n.* (h).
 - emblements, claim of representatives to, 497.
 - in common, lease by, 64.
 - joint tenants, lease by, 64.
 - leases by, 43.
 - for small holdings, 37, 45.
 - not under statute, 51.
 - under power, 52.
 - agreement to grant lease, 56.
 - Settled Estates Act, 1877...50.
 - Settled Land Act, 1882...43.
 - building lease, 47.
 - with option of purchase, 47.
 - conditions of lease, 44.
 - for 21 years and under, 46.
 - mining lease, 48.
 - when tenant for life has mortgaged, 70.
 - without power, 56.
 - liability of, for permissive waste, 328.
 - to repair, 309.
 - licence by, to copyholder to lease, 48.
 - lunatic, lease by, 14.
 - of leaseholds, liability of, for rent and covenants, 328.
 - persons having powers of, 48.
 - renewal of leases by, 46.
 - surrender of leases to, 46.

LIGHT, when lease carries right to, 136.

LIMITATIONS, STATUTE OF, 519.

- time within which action for rent may be brought, 307.
 - distress for rent may be made, 253.
 - on agricultural holding, 253.

LIMITED INTEREST, restrictions arising from, 43.

LIQUIDATED DAMAGES, 159.

LIQUIDATOR, lease by, 72.

- LIQUOR, covenant to take, devolution of rights under, 405.
- LIVERY OF SEISIN, on leases for lives, 125, 144.
- LIVE STOCK. leases of, 2, 377.
- LOCAL AUTHORITIES, partial exemption of leases to, from Mortmain Act, 38.
- LOCKED-UP PREMISES, entry upon, by landlord, on expiration of lease, 518.
- LODGER,
 entitled to conveniences of the house, 88.
 may remove goods before distress, 247.
 protection of, from distress, 206, 241.
 sale of his goods, under distress for rent due by tenant, 277.
 tender of rent by, 273.
 who is, 242.
- LODGING-HOUSE KEEPER, liability of, for goods of lodger, 88.
- LODGING HOUSES, leases of land for, 35.
- LODGINGS, agreement for letting furnished, is within Statute of Frauds, 104.
 effect of payment of rent for, 96.
 length of notice required to determine monthly or weekly tenancy, 435.
 rent for furnished, how recoverable, 190.
- LOOMS, entrusted to workmen, not distrainable by their landlords, 238.
- LORDS OF MANORS, leases of wastes by, 64. *n.* (f).
 licence to lease, 65.
- LUNACY, jurisdiction in, 12.
- LUNATIC,
 lease of, 11.
 by committee, 11, 13, 14.
 without authority of court, 11, *n.* (n).
 during lucid interval, 14.
 in Ireland, 11.
 personally, 14.
 settlement of lease by Master, 12.
 under Lunacy Act, 1890, s. 120...11, 12.
 under Settled Estates Act, 1877...13, 14.
 under Settled Land Act, 1882...13.
 lease to, 11.
 personally, 14.
 power vested in, exercise of, 12, *n.*
 renewal of lease by, 12.
 to, 12.
- MACHINERY,
 agricultural, when removable by tenant, 489.
 removable by tenant as trade fixtures, 485.
 when fixture, 483.

MEMORANDUM IN WRITING—*continued*.

- fixing commencement of term, 107.
- several documents, contained in, 105.
 - parol evidence to connect, 105.
- signature of, 108.
 - by auctioneer, 108, *n.* (x).
- sufficiency of, 105.
 - entry by steward, 108.
 - resolution of directors, 108.

MENTAL INCAPACITY, leases in case of, 12, 13.

MERGER,

- determination of tenancy by merger, 452.
- how avoided, 453.
- in equity, 453.
- of interests in different rights, 453.
- of reversion on sub-lease, 453.
- statutory provision as to, 453.
- when it occurs, 452.

MESSAGE, meaning of term, 130.

METROPOLIS MANAGEMENT ACTS, liability for expenses under, 366.

METROPOLITAN POLICE DISTRICT, remedy for wrongful distresses in, 289.

METROPOLITAN POLICE MAGISTRATE, recovery of deserted premises before, 530.

MILCH COWS, when impounded, may be milked by person distraining, 267.

MILL-STONE, a fixture, 484.

MINERALS,

- exception of, effect of, 140.
- grant of, 131.
- liberty to dig, not exclusive, 85.
- meaning of, 131.
- reservation of, in building lease, effect of, 129.
 - right to work, 140.

MINE, meaning of, 131.

MINES AND MINERALS, meaning of, 131.

MINES,

- covenants as to working of, 341, 372.
- description of, in lease, 127.
- exception of, effect of, 139, 140.
- lease of, under power, 53.
- lessee's obligation to work, 343.
- where working of, is waste, 325.

MINING LEASE,

- by ecclesiastical corporation, 29, 30.
- tenant for life, 48.
- fixed rent payable notwithstanding mine exhausted, 208.
- forfeiture for breach of covenant in, 475.
- power in, to distrain on adjoining mine, 244.
- royalty in, 147.
- stamp on, 172.
- trustee may not grant, 59.

MISTAKE,

- effect of, 187.
- deductions from rent permitted by, 202.
- in notice to quit, 441.
- payment of rent by, 198.
- recovery of rent paid by, 198.

MODE OF USING PREMISES,

- where there is an express agreement, 333.
 - construction of contracts relating to exercise of trades, 333.
- where there is no express agreement, 330.
 - warranty of fitness of premises for use intended, 331.
 - on demise of furnished house, 332.
 - land, 332.
 - unfurnished house, 331.
 - illegal or immoral purposes, 330.

MONEY in sealed bag liable to be distrained, 233.

"MONTH," meaning of, 437.

MONTHLY TENANCY, notice required to determine, 435.

"MORE OR LESS," construction of, 130.

MORTGAGE,

- attornment clause in, 83.
- tenancy from year to year under, 93.
- distress for rent under lease after, 224.
 - not under Conveyancing Act, 1881, 225.
 - under Conveyancing Act, 1881, 225.
- distress for rent under lease before, 224.
 - by mortgagor, 224.
 - by mortgagee, 224.

MORTGAGEE,

- compensation for improvements as against, 511.
- distress by. *See* MORTGAGE.
 - after assignment, 223.
- enforcement of covenant against, 403
- lease by*,
 - not under statute, 69.
 - under Conveyancing Act, 1881, 66, 67
- lease to, by mortgagor, 73.

MORTGAGEE—*continued*.

- notice by, to pay rent, 197, 224.
- payment of rent to, 196.
- second, distress by, 224.
- tenancy under, how created, 68.
- effect of, 69.

MORTGAGOR,

- distress by. *See* MORTGAGE.
- lease by,
 - after the mortgage,
 - not under statute, 68.
 - under Conveyancing Act, 1881, 66.
 - effect of, 67.
 - payment of rent under, 196.
- before the mortgage, 67.
- payment of rent under, 196.
- where mortgagor is tenant for life, 70.

MORTMAIN ACTS,

- exemptions from, 41
 - leases to corporations, 24, *n.* (u).
 - to local authorities, 38.
 - to trustees of charities, 41.
- what leases to corporations are within, 24.

MOSSSES & TURBARIES, exception of, 137, *n.* (d).**MUNICIPAL CORPORATIONS,**

- leases by, 34.
- renewal of leases by, 35.

MUSSEL FISHERIES, lease of shore used for, 33.**NECESSARIES**, where demised premises are, infant lessee liable for rent, 10.**NECESSARY REPAIRS**, agreement to do, 312.**NEGATIVE COVENANT**, re-entry for breach of, 166.**NET RENT**, meaning of, 148.**NEW DEMISE** on agreement for reduction of rent, 457.**NEW STYLE**, leases by deed reckoned by, 123.**NON-INSURANCE**, as cause of forfeiture, 465.**NON-REPAIR**, no defence to action for rent, 209.**NOTICE**

- by landlord to sheriff upon execution against tenant, 293.
- by mortgagee to tenant of mortgagor, 196, 224.
- constructive, of restrictive covenants, 408.
- of claim for compensation under Agricultural Holdings Act, 1883, 507.

NOTICE—*continued*.

- of distress for rent, 270.
 - action for want of, 290.
 - effect of want of, 272.
 - how to be served, 272.
 - landlord not bound by cause of taking mentioned in, 271.
- of intention to proceed before justices for recovery of possession, 528.
 - tenant's intention to execute drainage improvements, 504.
 - remove agricultural machinery, &c., 489.
- to determine tenancy for optional term of years, 451.
- to landlord, of want of repairs, 321.
- to remedy breach of covenant before forfeiture, 473.
 - costs of, 475.
- to tenant holding over, to pay double value, 514.
- underlessee deemed to have, of covenants in original lease, 388.

NOTICE TO QUIT, 434.

- abandonment of, 448.
- by agent, 443.
 - cestui que trust*, 444.
 - either landlord or tenant, 443.
 - joint tenant, 444.
 - real representatives, 444.
 - receiver, 444.
- certainty in, 442.
- dispensing with, 448.
- expiration of, 436, 437.
- form of*, 440.
 - alternative form, 441.
 - mistake in, 441.
 - sufficiency of, 441.
- irregularity of acquiescence in, 449.
- length of*, 434.
 - by agreement, 436.
 - custom, 434.
 - in quarterly, monthly, or weekly tenancy, 435.
- part only of premises, 442.
- period, how reckoned*, 436.
 - admission of tenant as to commencement of tenancy, 438.
 - where tenant has entered in middle of quarter, 440.
 - on different parts of premises at different times, 440.
 - under void lease, 439.
 - where tenant has held over, 439.
- service of*, 445.
 - by post, 446.
 - memorandum of service of, 447.
 - when notice given by tenant, 446.
 - where tenant cannot be found, 446.
- to whom to be given*, 445.

NOTICE TO QUIT—*continued.*

to whom to be given—continued.

- in case of tenant's death, 445.
- suspension of, agreement for, 448.
- waiver of. *See* WAIVER.
- when required, 434.
- withdrawal of, 448.

NUISANCE,

- covenant against, 337.
- deduction from rent of expenses of removal of, 301, 364.
- liability of landlord for letting premises in such a state as to constitute, 311.

NURSEYMEN may remove trees and hothouses, 485, 486.

OCCUPATION,

- by servant or agent, 87.
- tenant, effect of, 185. *See* ENTRY.
- evidence of, 122, *n.* (r).

OCCUPYING OWNER, rights of, in respect of ground game, 382.

OFFENSIVE TRADE, covenant against, 336.

OFFER, acceptance of, 102.

withdrawal of, 102.

OFFICES, lease of, 3.

OPERATIVE WORDS in lease, 126.

OPTIONAL TERM, tenancy for, 450.

OPTION,

- of purchase, 159.
- apportionment of, 161.
- by whom exercisable, 160.
- conditions precedent to, 160, 161.
- effect of, on stamp, 174.
- in building lease by tenant for life, 47.
- in lease by corporation, 24.
- executors or administrators, 60.
- real representative, 62.
- trustees, 59.
- notice to exercise, 161.
- right to insurance money under, 161.
- purchase money under, 160.
- to determine lease, 162.
- how to be exercised, 451.
- notice to exercise 451.
- who can exercise, 450.
- to stay at increased rent, 442.
- to take further term, 143, 161, *n.* (l).
- passes to trustee in bankruptcy, 423.
- when exercisable, 100.

- ORNAMENT, matters of, whether fixtures 490.
removal of, 491.
- "OUTGOINGS,"
effect of term in covenant to pay rates and taxes, 367.
rent free from, 365.
- OUTGOING TENANT,
compensation to, by whom payable, 501.
for away-going crops, 498.
tillages, 498.
under statute, 502.
- OVERPLUS on sale of goods distrained, 281.
- OVERSEERS, distress by, 229.
- OYSTER FISHERIES, lease of shore used for, 33.
- PARCELS of a lease, 126.
in agricultural leases, 126.
legal meaning of terms of description, 129.
parcel or no parcel, a question for jury, 129.
- PARISH,
council, leases by, 36.
power of, to hire land and let in allotments, 37.
lands, recovery of possession of, 527, *n. (s)*.
lease of, 35.
meeting, assent by, to letting, 36.
powers of, as to letting in allotments, 37.
- PARLIAMENTARY TAX what is, 365.
- PAROL AGREEMENT,
as defence to specific performance, 115.
collateral agreement, 104.
corroborative evidence of, 123. *n. (c)*.
enforced on ground of part performance, 108.
liability for rent under, 104.
when enforceable, 108, 109.
- PAROL,
evidence,
admissible to show condition of property, 121.
as defence to specific performance, 121, *n. (k)*.
of collateral agreement, 123.
custom, 122.
unstamped agreement not allowed, 117.
to connect documents for memorandum in writing, 105.
explain technical terms, 122.
when excluded, 121.
surrender void, 454.
tenancy, effect of assignment of, 403.
variation of written agreement, 104.

PART OF PREMISES,

- effect on rent where lessee fails to get possession of, 212.
- landlord occupying, liability of, to repair, 310.
- liability of assignee of, 402.
- notice to quit, 442.
- surrender of, 458.

PART PERFORMANCE OF PAROL AGREEMENT, 108.

- acts of, 109.
 - entry and expenditure, 110.
 - payment of increased rent, 110.
 - retention of possession, 110.
- extent of doctrine of, 109, *n.* (m).

PARTNER,

- power of, to take lease for partnership purposes, 63, *n.* (q).
- proof against, on disclaimer in bankruptcy, 428.

PARTNERSHIP, lease to, by partner, 450.

PARTY WALL, recovery of expenses of, 360, *n.* (a).PASTURE LAND, ancient, 326, *n.* (e).

PAVING EXPENSES, deduction of, 361.

PAYMENT OF RENT. *See* RENT.

PAWNBROKER, articles pledged with, not distrainable, 231.

PENAL RENT,

- construction of reservation of, 199.
- distress for, 221.
 - notice necessary before, 222.
- how long payable, 199,
- no stamp duty chargeable upon, 172.

PENALTY, 159.

PENSIONS, alienations of, 3.

PERFORMANCE OF COVENANT, difficulty in, 158.

PERISHABLE GOODS cannot be distrained, 233.

PERMISSIVE WASTE, what constitutes, 328.

PERPETUAL RENEWAL, covenant for, 99.

PLAN, construction of deed by reference to, 128, *n.* (x).

POND, meaning of, in grant, 130.

POOR-RATE,

- deduction of, from rent, 361.
- liability for, 361.
- nature of, 364.

POSITIVE COVENANT. *See* COVENANT.

POSSESSION,

- abandonment of, by sheriff, 236.
- action by lessee for not obtaining, 370.
- away-going crops, for purpose of, 500.
- change of, on surrender, 458.
- construction of provisoes for resuming, 169.
- delivery of, to stranger, 462.
- demand for, 514, 515.
- exclusive, necessary for lease, 84.
- lease in possession, what is, 55.
 - under power to be in, 55.
- obligation of tenant to give up, 512.
- of part of premises, power to resume, 169.
- recovery of*,
 - before justices, 527, 529, 530.
 - in County Court, 525.
 - High Court, 523.
- refusal to deliver, 449.
- retention of, as act of part performance, 110.
- when landlord may refuse to accept, 512.

POSSESSORY TITLE, effect of, 403.

POST,

- remittance of rent by, 215.
- sending of notice to quit by, 446.

POSTPONEMENT of right to distrain, 219, 252.

POTATOES may be claimed as emblements, 497.

POUND, 267.

- charge for impounding in, 282.
- liability for bad condition of, 267.

POUND-BREACH,

- remedy for, 269.
- what is, 268.

POUND-KEEPER, liability of, 264, *n.* (g).

POWER,

- construction of, 53.
- fraudulent execution of, lease void for, 52.
- lease under*, 52.
 - agreement by tenant for life for, 56, 57.
 - for new lease under, 55.
- attestation of, 58.
- by married woman, 15.
- kind of lease to be granted under, 53.
- length of lease to be granted under, 54.
- term in excess of, 54.

POWER—*continued*.

- lessee not to be dispunishable for waste, 55.
- must be in possession, 55.
- of mines, 53.
- property to be leased, 53.
 - “lands usually demised,” 53.
- rent to be reserved in lease under, 54.
- to limited company under, 55.
- with covenant for renewal, 55.
 - “usual covenants,” 55.
- of leasing, effect of Settled Land Act on, 47.
- relief against defective execution of, 56.
 - not in case of statutory power, 57.
- vested in lunatic, how exercised, 12, *n.* (q).
- to resume possession of part of premises, 169.
 - construction of, 169.

PREFERENTIAL DEETS, in winding-up, 304.

PREMISES,

- description of, in memorandum in writing, 107.
- changing nature of, waste, 326.
- fitness of, for use intended, 321.
- in lease, 125.
- meaning of term, 130.

PREVIOUS MODE OF ENJOYMENT, evidence of, to explain lease, 122.

PRIVATE RESIDENCE, covenant for use as, 338.

PRIVILEGE FROM DISTRESS, 230. *See* DISTRESS.

PRODUCE,

- agreements for taking, 341.
- distress on, 234.
 - where sold under execution, 236.
- impounding of, 265.
- injunction against removal of, 346.
- obligation to expend on premises, 345.
- re-entry for removal of, 168.
- removal of, for sale under distress, 278.
- sale of, under distress, 265.
 - execution where produce not to be removed, 350, 351.
- use and disposal of, by purchaser, 351.

PROMISSORY NOTE, payment of rent by, 215.

PROPER COVENANTS, 154.

PROPERTY,

- capable of being let, 2.
- description of, in lease, 126.
- in goods distrained, 279.

PROPERTY TAX,

- deduction of, from rent, 201, 360.
- agreement forbidding, is void, 362.

PROSTITUTION, leases for purposes of, 330.

PROVIDENT SOCIETIES, leases by and to, 38.

PROVISO FOR RE-ENTRY, 163, 464.

- applied to yearly tenancy, 465.
- construction of, 164, *n.* (p), 165, 166.
- for non-payment of rent, 465.
- demand of rent, 465.
- how framed, 164.
- implication of, 164.
- lessee cannot determine lease under, 464.
- on assignment without licence, 464.
- on breach of negative covenant, 166.
- to whom right of entry should be reserved, 164.
- when usual*, 163.
- in lease of public house, 164.
- on bankruptcy of lessee not usual, 150, 154, 163.
- breach of covenant not usual, 154.
- non-payment of rent usual, 151.
- who entitled to benefit of, 165.
- on severance of reversion, 416, 417.

PUBLIC HEALTH ACT, 1875, liability for expenses under, 366, 367.

PUBLIC HOUSE, covenant against use of premises as, 335.

- usual covenants in lease of, 150, *n.* (p), 152, 153.

PURCHASE,

- by lessee, effect of, 460.
- effect of occupation under agreement for, 91.
- option of. *See* OPTION OF PURCHASE.

PURCHASER, notice to, of terms of tenancy, 415.

QUARRIES, reservation of, 140.

QUARTERLY TENANCY, what constitutes quarterly reservation of rent, 192.

- length of notice required to determine, 435.

QUIET ENJOYMENT, COVENANT FOR,

- breach by person claiming under lessor, 375.
- construction of general covenant for, 371.
- special covenants for, 376.
- damages, measure of, in action on, 377.
- effect of, where lease invalid, 376.
- where lessee cannot enter, 375.

implied, 126, 369.

- breach of, 371.
- ceases with lessor's estate, 370.
- excluded by express covenant, 371.
- on word "demise," 369.

QUIET ENJOYMENT COVENANT FOR—*continued.*

- independent of other covenants, 156.
- is a usual covenant, 152.
- runs with land, 405.
- usual restricted covenant* for, 372.
- against what damage it protects lessee, 374.
- breach of, 373.
- must be by positive act, 374.
- subsequent to lease, 478.

QUITTING, terms of, 478.

RABBITS,

- lessee of right of shooting has no right to bring, on to farm, 383.
- right of tenant to shoot, 381.

RACK RENT, definition of, in Public Health Act, 1875, 203, *n.* (i).

RATE,

- deduction of, from rent, 203.
- statutory, 364.
- divided between landlord and tenant under local Act, 363.
- general district, liability for, 362.

RATES AND TAXES,

- action by landlord for, 369.
- construction of agreements as to, 366.
- demand for, not necessary, 369.

RATING,

- of house let in tenements, 362.
- of owners, 361.
- where part of house occupied by owner, 362.

RATIFICATION of notice to quit, 443.

REAL REPRESENTATIVES,

- distress by, 227.
- lease by, 61, 62.
- notice to quit by, 444.
- when rent payable to, 195.

RE-ASSIGNMENT,

- avoidance of liability by, 409.
- liability of successive assignees upon, 409.
- to whom it may be made, 409.

REBUILD, effect of covenant to, 317.

RECEIPTS FOR RENT, evidence of change of tenancy, 459.

RECEIVER,

- appointment of, does not protect landlord, 218.
- distress by, 225.
- when appointed by Court, 226.
- appointed under Conveyancing Act, 225.

RECEIVER—*continued*.

- effect of appointment of, 218.
- goods in possession of, not privileged from distress, 236.
- lease by, when appointed by court, 72.
- liability of, for rent, 72.
- notice to quit by, 444.

RECITALS, when inserted in lease, 126.

RECOUPING CLAUSE, 147.

RECTIFICATION OF LEASE, 187.

RECURRING TENANCY, determination of, 93, 433.

REDDENDUM, 146.

REDUCTION OF RENT, effect of verbal agreement for, 198.

RE-ENTRY,

- by grantee of reversion, 198, *n.* (a).
- demand of rent before. *See* DEMAND.
- not necessary for forfeiture, 467.
- proviso for, 150. *See* PROVISOR FOR RE-ENTRY.
- right of*,
 - against company, 304.
 - in tenancy under mortgage, 83.
 - not assignable, 164.
 - not dependent on reversion, 164.
 - to whom reserved, 164.

REFRESHMENT STALL at exhibition, rights of holder of, 85.

REGISTRATION,

- of assignment*,
 - in register county, 400.
 - under Land Transfer Acts, 401.
- of lease*,
 - in register county, 181.
 - of lands in Bedford Level, 181.
 - under Land Transfer Acts, 182.
- priority under, 400.

RELATION of landlord and tenant, requisites to, 2.

RE-LETTING,

- avoidance of lease by, 467.
- on continuance of periodic tenancy, 311.
- when it deprives landlord of claim to previous rent, 210.

RELIEF AGAINST FORFEITURE, 472.

- in equity, 476.
- on non-payment of rent, 476.
- under Conveyancing Acts*, 472.
 - application for, 474.
 - cases excluded, 475.
 - notice to remedy breach, 472.
 - when granted, 474.

REMAINDERMAN,

- effect of his encouraging lessee to improve, 51.
- receipt of rent by, 96.
- when bound by covenant of tenant for life, 96.

REMITTANCE OF RENT by post, 215.**REMOVAL,**

- of fixtures, when to be made, 492.
- of goods for sale under distress, 278.
- interference to prevent threatened, 251.

REMUNERATION ORDER, 184.**RENEWAL OF LEASE,**

- covenant for*, 162.
 - construction of, 162.
 - in lease by copyholder, 65.
 - by trustees, 59, *n.* (x).
 - under power, 55.
 - on payment of money, 163.
 - on performance of covenants, 156.
 - perpetual, 99, 162.
- in name of trustee, 74,
- leaning against perpetual, 162.
- notice of intention of, 163.
- performance of covenants, when condition precedent to, 163.
- sub-lessor's covenant to procure, 112.
- surrender for purpose of, 461.
- to co-owner with infant, 74. *See* INFANTS, MARRIED WOMAN,

LUNATIC, ECCLESIASTICAL CORPORATIONS.

RENT,

- action for*, 305.
 - by tenant in common, 64.
 - eviction, a defence to, 209.
 - not excluded by new lease, 305.
 - suspended during distress, 217.
 - where lease by deed, 305.
 - not by deed, 305.
- additional*, for improvements, 190.
 - when construed as penalty, 159, *n.* (a).
- adverse title by receipt of, 522.
- agreement for abatement of, 104.
 - not to raise, 414.
- amount payable*, 198.
 - certainty of, 147.
 - "net rent," meaning of, 148.
 - varying with price of wheat, 147.
- apportioned, when payable, 214.
 - apportioned parts of, liability for, 214.
- apportionment of, 211. *See* APPORTIONMENT OF RENT.
- arrear, when in, 194, 222.

RENT—*continued.**arrear*

interest on, 307.

limitation on recovery of, 253, 307.

in agricultural holdings, 253, 254.

right to, on death of lessor, 417.

attachment of, under garnishee order, 198.

authority to distrain for, 225.

receive, 196.

bankruptcy, remedy for, on, 298.

conditional acceptance of, 469.

co-parcener, claim for, by, 64.

deductions from, 201. *See* DEDUCTIONS FROM RENT.

demand of, 466.

before distress, 257.

“legally demanded,” “lawfully demanded,” 168, 252.

distress for. *See* DISTRESS.

on bankruptcy, 298.

winding-up, 302.

due out of every part of land, 146.

execution against tenant,

remedy for rent on, 291.

in admiralty, 298.

in county-court, 297.

on weekly tenancy, 296.

guarantee of, 306.

increased. *See* ADDITIONAL RENT.

effect of, 349.

liability for, under parol agreement, 104.

of receiver for, 72.

non-payment of, as evidence of determination of tenancy, 434.

relief from forfeiture on, 476.

paid by mistake, recovery of, 198.

parol variation as to, 198.

payable,

in advance, 146.

by custom, 192.

distress for, 222.

“if required,” 192.

distress for, 222.

notwithstanding destruction of premises, 207.

by fire, 207.

flood or enemy, 207.

non-repair by landlord, 208.

premises unfit for use or habitation, 208.

user of premises made illegal, 207.

to whom, 195.

after assignment, 197.

on intestacy, 195.

to real representative, when, 195.

RENT—*continued.**payable—continued.*

when, 191.

where, 194.

on lease by sovereign, 194.

payment of,

after assignment of reversion, 413.

before rent day, effect of, 193.

by corporation, effect of, 94.

mesne lessee, 370.

tenant holding over, 95.

covenant for, 149.

implied, 146.

lessee liable upon, after assigning lease, 410.

runs with the land, 405.

effect of, 216.

how avoided, 96.

in bankruptcy, 299.

estoppel by, 78.

evidence of attornment, 216.

first payment of, when due, 147.

how made, 215.

bill of exchange for, effect of taking, 215.

by cheque, 215.

on determination of tenancy at will, 431.

part performance, as an act of, 110.

reduced rent while covenant performed, 200.

tenancy from year to year, when created by, 92, 93, 95.

time for, 146.

construction of stipulations as to, 192.

to agent, 195.

grantor after grant of reversion, 198.

mortgagee, 196.

mortgagor, 196.

one of co-owners, 197.

person not entitled, 198.

by tenant for years, not a forfeiture, 462.

remainderman, effect of, 95.

third person, authority for, 197.

under agreement for lease, or void lease, 94.

payments which are not rent, 189.

“over and above” rent, 191.

recovery of, 217.

after forfeiture, 209.

lessor's death, when received by stranger, 418, *n. (2)*.

during repairs, 323.

effect of re-entry on, 465.

when paid to mortgagor, 196.

remedies for recovery of,

action, 305.

RENT—*continued.*

remedies for recovery of—*continued.*

distress, 217.

on bankruptcy of tenant, 298.

execution against tenant, 291.

winding-up, 302.

remittance of, by post, 215.

representation as to person entitled to receive, 198.

reservation of, 146.

additional, 152.

by way of royalty, 189.

mode of, 146, 148.

of several rents, 146.

on assignment, 191.

out of what property reserved, 146.

out of reversion, 189.

to whom to be reserved, 148.

to a stranger, effect of, 191.

what may be reserved as, 188.

need not be money, 188.

right to, not barred by time, 253.

set-off against, 200.

specialty debt, is equal to, 215.

surrender, rent after, 460.

suspension of payment of, 149.

on eviction, 209.

provision for, 207.

tender of, on distress,

after impounding, 272.

before impounding, 272.

seizure, 257.

in case of growing crops, 274.

must be unconditional, 274.

to whom to be made, 272.

tender of, to prevent forfeiture, 466.

RENT-CHARGE, liability of tenant for years for, 307.

within what time recoverable, 307.

REPAIR,

agreement by landlord to, effect of on tenant's liability, 313, *n. (z)*.

effect of express agreement for, 309.

breach of covenant to, 313,

continuing breach, 471.

liability of assignee to lessee for, 411.

measure of damages for, 322.

after expiration of term, 322.

during currency of term, 322.

breach of covenant to keep in, 314.

commencement of lessee's liability for, 319.

REPAIR—*continued.**covenant to,*

by lessor, 321.

conditional, 318.

construction of general, 311.

special, 319.

no specific performance of, 322.

on notice, 317.

to well and substantially repair, 315.

to what things covenant extends, 316.

when it runs with land, 404.

covenant to keep in repair, construction of, 314.

tenantable repair, 315.

keep and leave in repair, 316.

leave in, notice not required, 318.

put into repair, 313.

yield up in, 316.

effect of lessor doing repair himself, 317.

entry by landlord to, 321.

to view state of repair, provision for, 151.

execution of, to satisfaction of surveyor, 168.

failure by landlord to, under agreement, 450.

liability of underlessee to underlessor for, 389.

obligation of landlord to, 309.

tenant, 308.

effect of express agreement, 309.

of old premises, 312.

parol promise to, 124.

recovery of rent during, 323.

right to take materials for, 326.

supply of timber for, 318.

REPAIRING LEASES, of trust property, 59, *n.* (o).

REPLEVIN, 283.

action of, in County Court, 285.

in High Court, 285.

is personal, 284.

new trial in, 288.

removal of action of, to High Court, 287.

where title in question, 285,

who may bring, 284.

appeal from County Court in, 287.

bond in,

amount recoverable on, 285.

approval of, by County Court registrar, 285.

condition of, 285.

how broken, 286.

damages in, 284.

effect of, 287.

extension of time for, 276.

EPLEVIN—*continued*.

- nature of, 283.
- notice of, 284.
- proceedings in*, 284.
- sureties in, 286.
 - discharge of, 285.
- time for, 276.
- warrant in, issue and execution of, 287.
- when it lies, 283.
 - distress must be wrongful, 283.

REPRESENTATION, as to fitness of premises, 331.

REPUTED OWNERSHIP OF LESSEE, trade fixtures not within, 494, *n.* (b).

RESCUE OF GOODS DISTRAINED, 268.

- remedy for, 269.
- when lawful, 283.

RESERVATION, 137.

- construction of, 137.
- distinguished from exception, 137.
- implied, of easement, 135.
- nature of, 137.
- of incorporeal rights, effect of, 137.
 - mode of, 137.
- rent. *See* RENT.
- right of hunting, shooting, &c., 382.
 - to work minerals, 140.
- void for uncertainty, 138.

RESIDUE OF MERGED TERM, effect of assignment of, 144.

RESOLUTION OF DIRECTORS, a sufficient memorandum in writing, 108.

RESTRAINING STATUTES, THE, 27.

RESTRAINT OF TRADE, covenant void for, 159.

RESTRICTIVE COVENANTS, when lost by acquiescence, 344.

REVERSION,

- action by assignee of, 417.
- grant of*, 412.
 - effect on tenancy at will, 432.
 - grantee may avail himself of notice to quit given by predecessor in title, 443.
 - remedies of grantees, 413, 416.
 - lessees, 414, 416.
- severance of,
 - effect on covenants and conditions, 416, 417.
 - lease by joint tenants, 228.
- suspension of distress by purchase of, 218.

REVERSION—*continued*.

- what is sufficient to support a distress, 223.
- tenant from year to year underletting from year to year, 228.
- when surrendered or merged, next vested estate to be deemed reversion, 461.
- where covenants run with, 413, 414, 416.

ROADS, covenant to pay proportion of expense of, 321.

ROYALTY, 147, 189.

- payable to owner of brickfield, 189.
- when payable, 208.

SALE,

- by auction, covenant against, 338, *n. (t)*.
- of lease, contract for, 397.
- rights as to title on, 398.
- notice of terms of tenancy on, 415.
- under distress. *See* DISTRESS.

SCALE FEE, when applicable, 185.

- in case of lease at premium, 185.

SCHOOL,

- whether a business, 333.
- an offensive business, 337.

SCHOOL BOARDS,

- leases by, 35.
- to, 35.

SECOND DISTRESS,

- cannot generally be made, 262, 282.
- when it may be made, 263, 268.

SECOND NOTICE TO QUIT, when waiver of former notice to quit, 447.

SEE, leases of lands assigned as endowment of, 31.

SEIZURE of goods under distress, how made, 259.

- requisites to, 260. *See* DISTRESS.

SEPARATE USE, leases by married women of property settled to, 16.

SEQUESTATORS, attornment to, 458.

SERVANT, occupation by, 87, 91.

- of landlord, effect of tenant's becoming, 459.
- service of notice to quit upon, 445.

SEVERANCE,

- of reversion. *See* REVERSION.
- tenements, implied grant of easement on, 135.

SERVICE,

- of notice of distress, 270, 272.
- to quit, 445.
- given by landlord, 445.
- tenant, 446.

SERVICES, personal, reserved as rent, 188.

SET-OFF,

 against rent, 200.

 general rule, 200.

 in action for rent, 200.

SETTLED ESTATES. *See* LIFE, TENANT FOR.

 leases of, 43.

 by husbands entitled in right of wives, 18.

 lunatics, 13.

 married women, 18, 19.

SEWERS, reservation of power to make, 137, *n.* (Y).

SEWERS RATE,

 deduction of, from rent, 203, 360.

 tenant liable to pay, under reservation of net rent, 14

SHEEP, when distrainable, 237, 240.

SHERIFF,

 action by landlord against, 294.

 duty of, on execution against tenant, 293.

 liability of, where claim for rent, 294.

 may dispose of produce subject to agreement to expend it on land,
 351.

 not to sell off straw, turnips or manure in any case, or hay, &c.,
 contrary to covenants, 350.

 nor to sell clover or artificial grass growing under standing corn,
 346.

 notice to, of covenants against removal of produce, 351.

 possession of, must be continuous to prevent distress, 236.

 sale of produce by, 236.

 to send notice by post to landlord and his agent, stating that
 produce has been seized, 351.

 undertaking by, to pay one year's rent, 295.

SHOOTING AND SPORTING,

 construction of demise or reservation of, 382.

 effect of covenant for quiet enjoyment in lease of, 375.

SHOP, breach of covenant by conversion of premises into, 338.

SHRUBS, removal of, 485, 486.

SIGNATURE of memorandum, 108.

 whether essential to lease, 178.

SIX MONTHS' NOTICE, meaning of, 437.

SMALL TENEMENTS,

 recovery of possession of, before justices, 527.

 in county court, 525.

SOLICITOR, lease to, by client, 73.

SOVEREIGN, leases by infant, 6.

SPECIAL INDORSEMENT in action of ejectment, 523.

SPECIFIC PERFORMANCE,

action for, 114.

defences to, 114, 115.

hardship, 115.

parol evidence when admissible, 121, *n.* (k).

uncertainty, 114.

agreement for lease, of, 114.

by tenant for life for lease under power, of, 56.

building agreement, of, 114.

damages in lieu of, 116.

effect of agreement to let capable of, 82.

jurisdiction of county court in, 108, *n.* (c).

when ordered, 114.

against executors, 116.

not against bankrupt, 116.

infant, 116.

of covenant to repair, 322.

SPIRITS, covenant for purchase of, from lessor, 339.

SPIRITUAL CORPORATION. *See* ECCLESIASTICAL CORPORATIONS.

SPORTING,

construction of covenant for quiet enjoyment in lease of exclusive right of, 375.

reservation of right of, 382.

grant of leave to hunt over premises, 383.

special agreements relating to, 383.

STAMP,

adhesive stamp, where duty may be denoted by, 171, *n.* (z).

effect of non-stamping, 175.

ruling in favour of sufficiency of, 175.

facts showing liability for, to be set forth, 173.

fresh, where necessitated by alterations, 179.

on agreements, 116.

appraisements, 275.

counterparts, 177.

duplicates, 177.

leases, 170.

amount of, 170.

when chargeable, 170.

where contract for sale of fixtures, 174.

letting of different properties, 173, 174.

option of purchase, 174.

stranger covenants for rent, 174.

guarantees penalties, 174, *n.* (u).

sale of lease, 399.

STAMP—*continued*.

- on surrender, 454, *n.* (t).
- penalty for non-stamping, 175.
- special provisions as to amount of, 172.
- time for, 174.
 - stamping after due date, 175.
- where instrument relates to distinct matters, 173.

STANDING ROOM for machines, hire of, 85.

STATE OF PREMISES, representation as to, 124.

STATUTE OF LIMITATIONS, 519.

- acknowledgment, operation of, 522.
- adverse title by receipt of rent, 522.
- bar to right of entry or action under, 519.
 - in case of tenancy at will, 519.
 - for term, 521.
 - from year to year, 520.
- surrender, effect of, 522.
- title under, 403.

STATUTES CITED. *See* TABLE OF.

STATUTORY POWER, defective execution of, not aided, 57.

STEWARD,

- entry by, whether sufficient memorandum in writing, 108.
- power of, to lease, 71.

STOCK, agreement by tenant to take and leave at valuation, 501.

STRANGER TO THE REVERSION. sums by way of rent reserved to, 191.

STRANGER'S GOODS, removal of, to avoid distress, 248, *n.* (f).

STRAW

- construction of agreements relating to, 348.
- distress of, 234.
 - sale of, on condition that purchaser shall consume it on premises, 277.
 - where to be impounded, 265.
- taken in execution, not to be sold off, 350.

STRAYING CATTLE, when privileged from distress, 237.

SUBLEASE,

- effect on, of holding over by mesne tenant, 95.
- merger of reversion on, 453.

SUBLETTING, restraint on, 112, 384, 385.

SUBROGATION, right of, in insurance, 359.

SUBSIDENCE, damages for, 132.

SUCCESSORS IN BUSINESS, when entitled to benefit of covenant, 340.

- SUFFERANCE, tenancy by,
 determination of, 430.
 effect on, of assent by owner, 90.
 payment of rent, 90.
 not against Crown, 90.
 what is, 89.
 instances of, 89.
 tenant by, cannot underlet, 384.
- SUFFICIENCY OF DISTRESS, test of, 240.
- SUNSET, distress made after, illegal, 251, 282.
- SUPPORT, implied reservation of easement of, 137. *n.* (a).
- SURETIES FOR RENT,
 how discharged, 448.
 not entitled to distrain, 223.
- SURFACE, right to let down, 131.
 in reservation of mines and quarries, 140.
- SURRENDER OF TERM,
 apportionment of rent upon, 212.
 effect of, on covenants, 461.
 right to remove fixtures, 461.
 rights of third parties, 460.
 when followed by voidable lease, 455.
 express, 454.
 must be by deed or writing, 454.
 to leasehold reversioner, 454.
 for purpose of renewal, valid without surrender of underlease, 461.
implied,
 acts which constitute,
 acceptance of new lease, 456.
 tenant, 458, 459.
 creation of relation inconsistent with tenancy, 459.
 delivery of possession, 455.
 of mesne lease, effect on right of distress, 223.
 recital of, effect of, 455.
 recovery of rent after, 460.
 stamp duty on, 454, *n.* (t).
- SURVEYOR,
 approval by, of repairs, 168.
 as condition precedent, 319.
- SUSPENSION OF RENT, on eviction from part of premises, 209.
- TAIL, TENANT IN,
 lease by, 43.
 after possibility of issue extinct, 50.
 lunatic, 11, 14.
 voidable when not under statute, 56.

TAXES,

- agreements relating to property tax, 362.
- construction of agreements as to, 364.
- liability to pay, where there is no express agreement, 360.
- taxes which fall on landlord, 201-203, 360.

TECHNICAL TERMS, parol evidence to explain, 122.

TENANCY,

- creation of, 2.
- different kinds of, 89.
 - at will, 90.
 - by sufferance, 89.
 - for life, 100.
 - years, 98.
- from year to year, 93.
- when not to be disturbed while rent paid, 145.

TENANT,

- estopped from disputing landlord's title, 75.
- estoppel in favour of, 76.

TENANTABLE REPAIR, covenant to keep in, 315.

TENANT RIGHT,

- action to enforce, 501.
- assignment of, 501.
- when it arises, 501.

TENANTS IN COMMON. *See* COMMON, TENANTS IN.

TENANT'S FIXTURES, what articles are, 484.

TENDER,

- of amends before action for irregular distress, 291.
- rent. *See* RENT.
- before seizure, 257.

TENEMENTS, meaning of, 130.

TERM OF LEASE, 140.

- commencement of, 141, 142.
 - agreement must fix, 107.
 - ascertainment of, 141, 142.
 - from impossible date, 142.
 - where no date specified, 142.
- prolongation of, for purpose of covenant, 349, *n.* (z).

TERM OF YEARS, 98.

- bequest of, 418.
 - assent to. *See* ASSENT.
- tenancy for. *See* YEARS, TENANCY FOR.

TERMS,

- of quitting, 478.
- tenancy, 188.

- “THEREABOUTS,” meaning of, 131.
- “THERewith USED AND ENJOYED,” construction of, 134.
- “THOUSAND,” meaning of, by local usage, 122.
- TILLAGES, compensation for, 498.
landlord bound to pay for, where no incoming tenant, 501.
- TIMBER,
exception of, 139.
ornamental, effect of exception of, 139.
right of tenant to take for repairs, 356.
supply of, for repair, 368.
See TREES.
- TITHE RENT CHARGE,
deduction of, from rent, 204.
payable by owner, 363.
- TITHES,
grant of, to owner of land, 120, *n.* (u).
lease of, 2, 120.
- TITLE,
failure of vendor to make, 398.
right of purchaser to, on sale of lease, 398.
intending lessee, 111.
- TITLE DEEDS, cannot be distrained, 230.
- TOLLS OF TURNPIKE ROADS, agreements for letting, 120, *n.* (c).
- TRADE,
contracts in restraint of, 333.
covenants against, 333.
breach of, 335.
construction of, 333.
offensive trades, 336.
particular trades, 334.
relating to trading with particular persons, 339.
- TRADE FIXTURES, 484.
taking of, under compulsory purchase, 487.
when removable, 486.
as against mortgagee, 487, 488.
- TRADE UNIONS, leases by and to, 38.
- TREASON, effect of conviction of lessee for, 428.
- TREES,
construction of agreements relating to, 356.
distress on trees and shrubs, 234.
exception of, 138.

TREES—*continued*.

- excepted, lessee's liability to protect, 139.
- property in, as between landlord and tenant, 355.
 - landlord and third person, 355.
- bushes, 355.
- windfalls of trees, 356.
- removal of, 485, 486.
 - by tenant of allotment, 37.
- waste by cutting down, 321.
- what are timber, 355.

TRESPASS, ACTION OF, only maintainable after entry, 187.

TRUST, rights of lessee under declaration of, 403.

TRUST FOR SALE, lease of land settled on, 49.

TRUSTEE IN BANKRUPTCY,

- may disclaim lease, 424. *See* DISCLAIMER.
- dispose of lease, notwithstanding proviso or covenant against assignment, 393.
- what property vests in, 423.

TRUSTEES,

- appointment of, for Settled Land Act, 1882...45.
- lease by*, 58,
 - all join in, 59.
 - improper lease by, to lessee with notice set aside, 59.
 - of property of separate trusts, 59.
 - with option of purchase, 59.
- lease to*,
 - by *cestui que trust*, 73.
 - liability of trustee to lessor, 59.
- notice to, of lease by tenant for life, 45.
- renewal of lease in name of, 74.

TRUSTEES FOR SALE, lease by, 59.

UNCERTAIN FURTHER TERM, effect of lease with, 143.

UNCERTAIN INTEREST, continuance of tenancy where landlord entitled for, 498.

UNCERTAINTY, reservation void for, 138.

UNDERLEASE, 384.

- agreement for, 112.
- rights under, 380.
- subject to lessor's approval, 386.
- covenants to be inserted in, 388.
- covenant to repair in, 389.
 - damages on, 389.
 - when it is a covenant of indemnity, 389.
- distinguished from assignment, 386.
- provision against assigning in, 386.

UNDERLEASE—*continued*.

- sale of, as lease, 398.
- surrender of, not necessary on surrender of original lease for purpose of renewal, 461.
- what constitutes, 386.

UNDERLESSEE,

- acceptance of, as tenant, 459.
- deduction from rent by, of payments to lessor, 389.
- duty of, to examine head lease, 112.
- effect of holding over by, 512.
- forfeiture as against, 464.
- implied agreement by his landlord to protect him from superior landlord's distress, 370.
- liability of*,
 - for repairs, 389.
 - of underlessees *inter se*, 389.
 - to lessor, 387.
 - for rent, 387.
 - in equity, 408.
 - on covenants in lease, 387.
 - when taking without licence, 396.
 - to underlessor, 389.
- not affected by surrender, 461.
- notice to, of covenants in lease, 388.
- original landlord cannot recover against, by notice to quit in his own name, 445.
- recovery by, of compensation for misdescription of term, 112.
- when bound by covenants in lease, 388.

UNDERLET,

- contract to, for forbidden purpose, 386.
- covenants relating to underletting, 384.
- breach of, 385.
- construction of, 385.
- forfeiture for, 475.
- right to, 384.

UNDERWOOD,

- exception of, 138.
- waste by cutting, 325.

UNIVERSITIES, leases by, 32.

UNLAWFUL PURPOSE, assignment for, 412.

UNREASONABLE refusal to permit assignment, 394, 395.

UNSTAMPED INSTRUMENTS. on what terms received in evidence, 175.

USAGE. *See* CUSTOM.

- when evidence of, is admitted to explain lease, 122.

USE, things in, cannot be distrained, 231.

USE AND OCCUPATION, ACTION FOR, 305.

- against executor, 422.
- against person in possession under contract of sale, 92.
- damages in, 306.
- entry necessary for, 187, 306.
- when it lies, 221, 306.
- where written agreement, 117.

USE OF PREMISES,

- covenants as to, 333.
 - continuing breach of, 471.
 - enforcement of, 343.
 - waiver of, 334.
- when waste, 324.

USUAL COVENANTS, 150.

- covenants held not to be, 152.
- in lease of public house, 150, 152, 153.
 - under power, 55.
- what are, 151.
 - for quiet enjoyment, 152.
 - how determined, 154.
 - provision for lessor to view state of repair, 151.
 - to keep and deliver up in repair, 151.
 - pay rent and taxes, 151.

USUAL FEASTS, meaning of term, 192.

VALUATION as a condition precedent, 156, *n.* (n).

VERBAL DISCLAIMER, what amounts to, 449.

VERBAL EVIDENCE, when admissible, 121.

VERBAL LEASE, in what cases valid, 118.

VESTING ORDER,

- on disclaimer, 427.
- liability under, 427.

VIEW STATE OF PREMISES, entry to, 321.

VINTNER, who is a, 336.

VOID,

- assignment, not a breach of covenant not to assign, 392, *n.* (c).
- lease, acceptance of, not implied surrender, 457.
 - effect of occupation under, 91.
 - payment of rent under, 27, 94.
- incapable of confirmation, 56.
- yearly tenancy under, 439.

VOIDABLE LEASE, confirmation of, 56.

VOLUNTARY WASTE, what amounts to, 323.

WAIVER,

of double value, 517.

of forfeiture,

acts amounting to, 468.

action for rent, 469.

advice by landlord after forfeiture to purchase interest of lessee, 464.

agreement for new subsequent term, 470.

demand of rent, 469.

distress, 469.

notice to repair, 470.

receipt of rent due since forfeiture, 468.

recital of existence of tenancy, 470.

where breach of covenant causing forfeiture is continuous, 471.

effect of, 471.

of notice to quit, 447.

by acceptance of rent, 447.

by demand of rent, 448.

by distress, 448.

holding over, 448.

by second notice to quit, 447.

consent of both parties requisite to withdrawal of notice to quit, 448.

“WALKING POSSESSION,” 282, *n.* (x).

WALL, ownership of, 354.

WARRANT,

for recovery of possession, 529.

liability for proceeding under, 529.

of distress,

express indemnity to bailiff under, 256.

implied indemnity to bailiff, 256.

WARREN,

effect of grant of, 129.

lease of, how made, 120, *n.* (z).

WASTE, 323.

action for, 329.

damages in, 329.

injunction against, 329.

kinds of,

meliorating, 326.

permissive, 328.

voluntary, 323.

by acts of destruction, 324.

cutting down trees, 324.

opening mines, 325.

by changing nature of demised premises, 326.

WASTE—*continued*.

- lease without impeachment of, 326.
- liability of lessee for, 327, 328.
- only of thing demised, 325.
- tenancy at will determined by, 433.

WASTES,

- improvement and letting of, 2, 64, *n.* (f).
- under custom, 64, *n.* (f).
- with consent of three-fourths of commoners, 64, *n.* (f).
- inclosure of, for letting to the poor, 36, *n.* (x).

WATER,

- covenant to repair ornamental, 312.
- liability for escape of, 310.
- meaning of, in grant, 130.
- rate, liability for, 366, *n.* (t).

WATERCOURSE, exception of, 137, *n.* (a).

WAY, RIGHT OF,

- grant or reservation of, 93, 137.
- implied grant, 136.
- leases of, 120.
- under what words, will pass, 133.

WEEKLY TENANCY,

- claim for rent on execution, 296.
- determination of, 93.
- liability of landlord to repair in, 309, *n.* (m).
- notice to quit in, 435.
- expiration of, 438.

WILL, TENANCY AT,

- creation of, 90.
- express, 90.
- implied, 90.
- by general letting, 92.
- holding over pending new lease, 92.
- occupation under agreement for lease, 91.
- purchase agreement, 91.
- void lease, 91.
- from permissive occupation, 91, 92.
- determination of, 431.
- express, 431.
- by landlord, 431.
- tenant, 432.
- implied, 432.
- by assignment, 83, 432.
- death of landlord or tenant, 433.
- distress on, 220.

WILL, TENANCY AT—*continued*.

- reservation of rent on, 93.
- under mortgagee, 83.
 - determined by death of mortgagor, 83.
- yearly tenancy, when changed to, 92.

WILL, TENANT AT,

- assignment by, 392.
- claim of, to emblements, 497.
- liability of, for waste, 328.
- obligations of, as to fences, 352.
- underleases by, 384.

WINDFALLS OF TIMBER, property in, 356.

WINDING-UP,

- apportionment of rent in, 303.
- distress for rent in, 302.
 - by mortgagee, 304.
 - leave to distrain, 303.
- distress levied before, 304.
- preferential debts in, 304.
- proof for future rent in, 304.
- right of re-entry on, 467.

WOODS AND UNDERWOODS, exception of, 138.

WORKING MEN'S DWELLINGS,

- leases for, 35.
- liability for repair of, 310.

WRIT, in ejectment, when it may stand in place of demand and re-entry, 466.

WRITING, MEMORANDUM IN. *See* MEMORANDUM IN WRITING.

WRITTEN AGREEMENT, parol variation of, 104.

YEAR, LEASE FOR A. effect of holding over after, 92.

YEAR TO YEAR, TENANCY FROM, 93.

- alteration to term of one year, effect of, 180.
- assignment of, 400.
- circumstances showing intention to create, 92.
- commencement of, 438.
 - in implied tenancy, 97.
- creation of*, 93, 144.
 - express, 93.
 - expressions creating, 144.
 - implied, 93, 95, 143.
 - by acceptance of rent, 51, 56.
 - agreement to pay yearly rent, 92.
 - attornment to mortgagee at yearly rent, 83.
 - holding over and paying rent, 95.
 - payment of rent to mortgagee, 68.
 - under agreement for lease, 81.

YEAR TO YEAR, TENANCY FROM—*continued*.

determination of, 93.

by disclaimer, 449.

notice to quit, 433. *See* NOTICE TO QUIT.

implied tenancy, 94.

tenancy under void lease, 439.

distinguished from tenancy at will, 93.

implication of, how rebutted, 95.

terms,

consistent with yearly tenancy, 97.

inconsistent with, 98.

of implied tenancy, 96.

under corporation, 94.

YEAR TO YEAR, TENANT FROM,

distress by, 228.

liability of, for permissive waste, 328.

to repair, 308.

to repair fences, 352.

right to underlet, 384.

YEARS, TENANCY FOR,

determination of, 450.

distinguished from tenancy from year to year, 98.

forfeiture by disclaimer, 449, *n.* (a).

how constituted, 124.

may be made dependent on contingency, 99.

option of further term, 100.

what certainty requisite, 99, 141, 143.

YEARS, TENANT FOR,

liability of, for permissive waste, 328.

to repair, 309.

repair fences, 352.

right to underlet, 384.

YIELDING AND PAYING, implied covenant under, 146, 149.

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